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William P. Murphy

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Mississippi Law Journal

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STATE SOVEREIGNTY PRIOR TO THE CONSTITUTION

*William P. Murphy**

INTRODUCTION

Almost immediately after the adoption of the Constitution in 1789 there were advanced sharply conflicting conceptions of what the nature of the political system under the Constitution was intended to be or ought to be. The disagreement was focused principally on the question of the relationship and the distribution of power between the central government and the states. The positions which were taken then have continued in opposition to each other throughout American constitutional history in a perennial contest between "nationalism" and "states rights." In the early days of the Constitution, these opposing views were personified by Alexander Hamilton and Thomas Jefferson.

Jefferson maintained that the states were sovereign except to the extent that sovereignty had been expressly surrendered and that the powers of the central government should therefore be strictly and narrowly construed. "Hamilton argued that the Constitution created a supreme central government whose powers should be liberally and broadly construed so as to best effectuate the objects and purposes expressed in the Constitution itself." Each position sought to bolster itself by resorting to the experience and history of the period which preceded the Constitution. States righters argued, on the one hand, that the states had been sovereign upon separation from Britain, that they had been sovereign under the Articles of Confederation, and that this sovereignty continued under the Constitution unless expressly surrendered. Of course, if the states had not been sovereign on separation from Britain or under the Articles, then it would be difficult, if not impossible, to support their sovereignty under the Constitution. Nationalists therefore argued in favor of a national existence and an exercise of national sovereignty continually since 1776.

Independence from Britain was declared in 1776 by a Continental

*Professor of Law, University of Mississippi. This article is a portion of a thesis now in preparation for the Law School, Yale University.

Congress composed of delegates from the thirteen colonies. This Congress in 1777 adopted and submitted to the new states for ratification Articles of Confederation. Pending ratification, the Continental Congress continued in existence to prosecute the war, by and large governing itself by the Articles as though they had been ratified. The Articles of Confederation became officially operative in 1781. They lasted until 1789 when they were replaced by the Constitution. In this period from 1776 to 1789 there occurred the first great conflict in our constitutional history between "nationalism" and "states rights." That conflict is the subject of this article.[1]

THE ARTICLES OF CONFEDERATION

The story begins with the drafting of the Articles of Confederation. The First Continental Congress, which met in September, 1774, went no further than to advocate what today we would call a dominion conception of colonial status. But by the spring of 1776, Lexington, Concord and Bunker Hill were history, de facto revolutionary governments had been organized in the colonies, and the movement toward independence was sweeping with irresistible momentum to its inevitable end. The delegations to the Second Continental Congress from several of the colonies had been authorized to declare independence, and on June 7, therefore, Richard Henry Lee, in accordance with such instructions from the revolutionary government of Virginia, arose in Congress and moved "that these United Colonies are, and of right ought to be, free and independent states, and that they are absolved from all allegiance to the British crown, and that all connection between them and the state of Great Britain is, and ought to be, totally dissolved." In the same motion Lee also proposed "That a plan of confederation be prepared and transmitted to the respective colonies for their consideration and approbation."

[1]The following selected bibliography lists the sources which were especially helpful in the preparation of this article. General treatises on constitutional history: Bancroft, History of the Constitution of the United States I (1885); Curtis, Constitutional History of the United States I (1897); McLaughlin, A Constitutional History of the United States (1935); Hockett, The Constitutional History of the United States I (1939); Kelly and Harbison, The American Constitution (1948). Detailed studies of the confederation period: McLaughlin, The Confederation and the Constitution (1905); Nevins, The American States During and After the Revolution (1927); Burnett, Letters of Members of the Continental Congress (1923) and The Continental Congress (1941); Jensen, The Articles of Confederation (1940) and The New Nation (1950). Articles: Van Tyne, "Sovereignty in the American Revolution: An Historical Study", American Historical Review, XII, 529-545 (1907); Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention", American Historical Review, XXX, 511-536 (1925); Jensen, "The Idea of a National Government during the American Revolution", Political Science Quarterly, LVIII, 356-379 (1943). Unless otherwise noted, all quotations have been drawn from the above sources, principally Burnett's Letters. Spelling and punctuation have frequently been modernized for easier reading.

The drafting and promulgation of the Declaration of Independence have tended to overshadow in our history the result of the second part of Lee's motion—the drafting and ratification of the Articles of Confederation. On June 12, 1776, a committee was appointed to draft articles, and exactly a month later submitted a proposed draft. The Continental Congress debated the matter during July and August of that year, then dropped it until the following April, when it was taken up again and debated more or less regularly until November, 1777, when the Articles were finally approved and sent to the states for ratification.

The Articles of Confederation may be briefly summarized. The confederacy created by the Articles was styled "The United States of America." The nature of the union was described as a "league of friendship" between the states "for their common defense, the security of their liberties, and their mutual and general welfare." The central government consisted of a single representative body called the Congress, the members of which were chosen by the states in such manner as the legislature of each state might determine. No state was to be represented by less than two or more than seven members, and no person could be a delegate for more than three years in any period of six. Each state was to maintain its own delegates and reserved the right to recall them. Voting in the Congress was by states, and each state had one vote.

Congress was granted the "sole and exclusive right and power" of determining war and peace; sending and receiving ambassadors; entering into treaties and alliances (but no treaty could curtail the power of the states over imports or exports); establishing rules for deciding captures on land and sea; appointing courts for piracies and felonies and determining appeals in prize cases; regulating the value of all coinage, its own and that of the states (but there was no control over state issuance of paper money); fixing a uniform standard of weights and measures; regulating trade with the Indians (except within the territory of any state); establishing post offices; appointing officers and making rules and regulations for the government of land and naval forces (except that each state reserved the power to make all appointments under the rank of colonel). Congress was to be the last resort on appeal in disputes between states concerning boundaries, jurisdiction or any other cause. Congress had authority to appoint a "Committee of the States" to consist of one delegate from each state, the committee to sit when Congress was not in session and execute such powers as Congress might vest it with. For the execution of Congress' most important powers, the consent of nine states was necessary; in all other cases a majority of the states was required. All expenses were to be de-

frayed out of a common treasury, to which each state would contribute in proportion to the value of the land in each state.

The states were not to send or receive ambassadors; enter into treaties or confederations with each other without the consent of Congress; lay any imposts or duties which were in conflict with treaties, nor engage in war without the consent of Congress unless invaded. The free inhabitants of each state were to be entitled to all the privileges of free citizens in the several states; there was to be free ingress and egress for purposes of trade and commerce; fugitives from justice from one state to another were to be delivered up; and full faith and credit would be given in each state to the records, acts and judicial proceedings of every other state. The most important provision of all was Article II, which stated that "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Each state agreed to abide by the determination of Congress on all questions delegated to it by the Articles, and all the Articles were to be inviolably observed by every state. The union was declared to be perpetual, and no alteration could be made in the Articles unless by agreement in Congress, and approval by the legislature of every state.

Now the fact of the matter is that the Articles of Confederation as finally adopted, and summarized above, were fundamentally different in their essential nature from the proposed document which the drafting committee had submitted to Congress in July, 1776. That difference and what brought it about constitute the first chapter in the story of "states rights."

CONSERVATIVES AND RADICALS

In order to appreciate the significance of the events which transpired, it is necessary to realize that there were, in fact, two American revolutions. The military and political revolution against England was directly related to, indeed paralleled by, a political and economic revolution within the colonies. This second revolution in essence was a democratic revolution against the political aristocracy which dominated colonial life. Under the crown, economic power had become concentrated largely in the hands of a small minority of the population—the large coastal and tidewater landowners and the wealthy merchants of the seaboard towns. Along with economic power had come political control. According to the views of the privileged minority, the primary purpose of law and government was the protection of property. The property laws of the time, such as entail and primogeniture, were congenial to the perpetuation of their ownership of land and wealth. The

colonial governors, themselves being drawn from the upper social and economic class, were almost invariably sympathetic, and since law enforcement officials were appointed by the governors, the whole apparatus of colonial government was an instrument for the protection of propertied interests.

As the population of the towns increased and as the frontier moved farther west, political control was perpetuated in various ways. Strict property qualifications for voting and even stricter ones for holding office effectively stifled any challenge to the established order from the town masses of the seaboard. Political control was maintained and insulated against the increasing population of the west by the simple devices of delaying the creation of new counties and then later denying the new counties their proportional representation in the colonial assemblies. Grievances were accentuated by varying special or local conditions. Western discontent was aggravated by the land exploitation of speculators of the ruling clique and by the chronic failure to provide adequate military protection against the Indians. In New England, the resentment over land speculation was magnified by the relative scarcity of land. And although taxation without representation was resented everywhere, in many states, as in Virginia, it was especially galling to the members of many religious faiths to see their tax money used to support an established church. But entrenched in their position, the ruling classes felt secure in ignoring the repeated protests and demands of the disfranchised. Occasionally, the discontent became severe enough to result in outbreaks of violence, as in Bacon's Rebellion in Virginia and the Regulator movement in the Carolinas. In such instances, the military power of the crown was available to repress these threats to the established order.

Thus, by the time of the period preceding the Revolution with Britain, colonial society was divided into rather well-defined forces of conservatism and radicalism, each reflecting the interests and aspirations of different economic, social and religious groups, and each with its own corresponding view of the most desirable form of government. On the one hand were the "conservatives"—the wealthy town merchants, the large landowners and planters, the bankers and the land speculators, the privileged minority which constituted the upper crust of colonial society. Such conservatives found their interests best protected by colonial governments characterized by strong governors, weak legislatures, strict qualifications for voting and holding office, and supported at all times by the strength and power which were centralized in the crown. On the other hand were the numerically larger "radicals"— the small back-country farmers, and the mechanics, artisans and small

tradesmen of the towns, the disfranchised majority which occupied a distinctly inferior position in all respects. Politically, these groups favored colonial governments dominated by legislatures rather than by governors, legislatures chosen under less stringent suffrage qualifications so as to permit more democratic control. They were opposed to all the special economic and political privileges of the old order, and therefore they eventually came to oppose the crown, the strong central authority which perpetuated it.

It was not until the Revolutionary period, however, that the forces of colonial radicalism became united in their efforts and, ironically, it was the conservatives who were largely instrumental in bringing about this result. In 1763, at the close of the Seven Years War, Britain embarked upon those policies which were to lead to the eventual break—politically, to bring the colonies under stricter control, and economically, to exploit them to the greater profit of the home country. The Sugar Act, the Stamp Act, the Declaratory Act, and the Townshend Acts were all instruments of this new colonial policy. The new program adversely affected the economic interests of nearly everyone in the colonies, but especially that of the merchants and the planters. It was these conservative groups, therefore, the colonial ruling classes, who were most articulate and active in their opposition to the new British policy. They were naturally unwilling to see their economic interests sacrificed for the profit and benefit of the crown and of individuals in the mother country. What they wanted was a large degree of political and economic independence, within the empire, to control their own destiny. They sought to support their position by various legal and constitutional doctrines, and to give persuasive effect to these arguments, the merchants organized among the town masses popular demonstrations which frequently spilled over into riots and violence against British power.

This resistance on the part of the conservatives to British policy brought to a head the long-standing domestic class conflict. The same "democratic" arguments which the conservatives advanced to support their claim to self-government as against the power of Parliament were readily adaptable to the uses of the internal revolution. There now arose in the ranks of the radicals able leaders who used these same arguments to support their bid for more "democracy" at home. The concept of government as a social compact resting on the consent of the governed, the natural rights of man as a limitation on the power of government, and no taxation without representation not only became the rallying cries against Britain, but also the basic tenets of the radical philosophy of domestic government. The radical leaders were quick

to recognize that the differences with Britain offered a provident opportunity to throw off, at one time and by one effort, both their local thralldom and the centralized British power which maintained it. And so they instituted committees of correspondence, sent out circular letters, and began to urge collective action throughout the colonies. Having been used by the conservatives in mass demonstrations, they now organized their own. They took over the cause of the conservatives, and converted what had been a movement of protest into a drive for political independence. With singleness of purpose, they combined their domestic revolution against the aristocracy with an American revolution against Britain, and by identifying the two, they were able to assume the unimpeachable role of American patriots defending American rights against foreign oppression.

The conservatives were neatly caught in the web of their own contradictions, for there was no ground, theoretical or practical, on which successfully to oppose at the same time both the British and the radical policies. In balancing the evils from their point of view, however, most conservatives in the early stages felt that independence and domestic revolution presented the most fearsome prospect. The conservative position therefore became one of opposing any break with the mother country so long as there was any hope of achieving their desires by adjustment and conciliation. But by this tactic they were able to fight only a delaying action against the radicals, who worked to hasten the separation, and when they joined with the radicals in forcible resistance, their position was fatally undermined. When the radical viewpoint eventually won the day and independence was declared, the conservatives were put to a difficult choice between loyalty to Britain and support of the Revolution. Some became loyalists, opprobriously termed "Tories." The majority, however, felt, like Franklin, that matters had gone so far that if Americans did not hang together they would surely hang separately.

But those conservatives who were reluctantly led to support of the Revolution continued to seek the protection of their interests and their status, and they did this by two complementary programs. One approach was to seek to retain local control where they could by acquiring dominance of the new revolutionary state governments which were being formed. In all the states the struggle between conservatives and radicals for political control was intensified, but the tenor of the times being as it was, the radicals were almost everywhere initially triumphant. The second, and principal, goal of the conservatives was broader, more ambitious, and yet perfectly logical. With their prop, the British crown removed, they now made common cause throughout the new states to substitute for it a new strong domestic central government.

Such a government, with powers comparable to those of the crown, would be the instrument for their protection against the local democracy of the radicals. The radicals, on the other hand, now that they had succeeded in asserting independence from one strong central authority and attaining control of the new state governments, naturally sought to protect their newly won position. They therefore opposed the rise of a new centralization and raised against it the doctrine of state sovereignty.

The difference between the radical and conservative positions on the question of relations with Britain was dissolved with the declaration of independence, for the great majority of Americans from then on supported the revolution. Domestically, however, the cleavage between the two groups on political and economic questions continued throughout the revolutionary and confederation periods. Indeed, this is the central and dominant fact which will explain and give understanding of the events of the time, for each group through its leaders argued and strove for that form of government under which its own political and economic interests could most readily be realized and protected. The conservative leaders during this period were such men as George Washington, James Madison, Alexander Hamilton, James Wilson, John Jay, Robert Morris, and Gouverneur Morris. This group consistently advocated a strong central government created along "national" lines and possessed of authority and power paramount to the states. In the radical group were men like Samuel Adams, Patrick Henry, Richard Henry Lee, Thomas Jefferson, George Mason, George Clinton, and one whose name is less familiar in American history, Thomas Burke. Just as consistently this group espoused a "federal" type government in which the central authority was limited and distinctly subordinate to the political sovereignty of the states.[2]

THE DICKINSON DRAFT

With this background, let us consider now the drafting of the Articles of Confederation. The Declaration of Independence had been an expression of radical philosophy drafted by radical leaders. But the committee of thirteen which was appointed in June, 1776, to draft proposed articles for the consideration of the Continental Congress included only two members who were out and out representatives of the radicals. The remaining eleven were identified in greater or less

[2]The foregoing discussion of the opposing forces of conservatism and radicalism is not intended, of course, as an absolute or complete analysis or explanation of colonial society or the events of the period. There were many other influences at work, and there were individual exceptions. Some conservatives were quick for independence, some radicals opposed it. Some radicals were nationalists, some conservatives believed in state sovereignty. Then as now, human motivations and beliefs were multiple and complex.

degree with the conservative interests, and of these, John Dickinson, who had been an outstanding opponent of independence, was the dominant member. His personal contribution to the task at hand was so great that the committee's product has forever since been known as the Dickinson draft. As we have seen, the conservatives as a class were originally opposed to independence, since British colonial rule had long been dominated by them and dedicated primarily to the protection of their interests. Once independence became inevitable, however, they quickly united in an effort to create a new central government with power superior to that of the states, and thus sought to protect themselves against the leveling and democratic effects of the domestic revolution which were finding expression in the new state governments. The Dickinson draft of the Articles clearly reflects this purpose.

The simple fact is that the Dickinson draft would have created a national government with almost unlimited power and at the same time would have placed severe restrictions on the powers of the states. Most important of all, in the vast area of powers not specifically enumerated or specifically denied, the balance clearly was struck in favor of the nation and against the states. In this original draft, the "sole and exclusive" powers of Congress were not limited by those restrictions which later found expression in the Articles as adopted. Provision was made for a permanent executive, with strong powers and capacity for centralization of authority. The restrictions on the states were numerous and did not contain those exceptions which diluted their strength in the final form. All of these provisions will be more fully considered later. Important as they were, however, in the fulfilment of the conservative design, they did not constitute the most significant parts of the Dickinson draft. The essential provisions were those which related to the distribution of power between the central and state governments.

Article III provided as follows: "Each colony shall retain and enjoy as much of its present laws, rights and customs, as it may think fit, and reserves to itself the sole and exclusive regulation and government of its internal police, *in all matters that shall not interfere with the Articles of this Confederation.*" And in Article XVIII, which granted power to Congress, it was provided that the United States should not "interfere in the internal police of any colony, *any further than such police may be affected by the Articles of this Confederation.*" The significance in these sections lies in the portions which have been italicized. On its face Article III appeared to be a recognition and guarantee of state sovereignty. Actually, state sovereignty was limited by the provision that state control over its "internal police" should not "interfere with" the Articles, including their grants of power to Congress.

Similarly, in Section XVIII, the disclaimer of interference by the United States in "internal police" was to a large and indefinite extent negated by the modifying clause "any further than such police may be affected" by the Articles. In substance, the powers of the national government were to be the standard by which the internal police powers of the states were to be determined. To put it the other way around, the internal police powers of the states were not to be considered as a limitation on the powers of the United States.

This, of course, was directly opposed to the intention and purpose of the states which had formed revolutionary governments in which the radicals had obtained ascendancy. The state constitutions which were prepared and put into effect by the radicals endowed the state governments with all the powers which attend political sovereignty, including the powers of war and peace. It was recognized in the Continental Congress that independence could not be declared unless the Congressional delegates were authorized by their respective states to declare it, and that "if the delegates of any particular colony had no power to declare such colony independent, certain they were that others could not declare it for them, the colonies being as yet perfectly independent of each other." As a matter of fact, even after Congress had declared independence, seven states supplemented such action by declarations of their own. If a matter of such nature as declaring independence was considered to be within the province and control of the states, then it is not surprising that when the states authorized their delegates to the Second Continental Congress to unite with the other colonies, they did so only on the condition that state sovereignty over its internal affairs would be recognized in any such union.

Thus, Pennsylvania reserved "to the people of this colony the sole and exclusive right of regulating the internal government and police of the same." North Carolina authorized its delegates to unite "in declaring independency and forming foreign alliances, reserving to this colony the sole and exclusive right of forming a constitution and laws for this colony." Rhode Island delegates were cautioned in their instructions to secure "in the strongest and most perfect manner, its present established form and all the powers of government, so far as relates to its internal police and conduct of our own affairs, civil and religious." Maryland likewise authorized its delegates to join the other colonies in declaring independence and forming a confederation, providing that "The sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof." And Virginia, under whose authority Lee had moved for independence and

a plan of confederation, included in its instructions to its delegates: "Provided, That the power of forming government for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures."

It will readily be seen that such instructions were completely consistent with the beliefs and program of the radicals, who felt that the kind of democracy they were seeking was incompatible with a strong central government and could only be realized in states which were sovereign in their internal affairs. The Dickinson draft, on the other hand, was completely consistent with the beliefs and program of the conservatives, who disliked and feared democratic rule, and who felt their best protection lay in a strong central government with broad powers over the states. To achieve this goal in the face of the limiting instructions which the states had imposed upon their delegates in favor of state sovereignty required some indirection of approach and subtlety of language. Hence the apparently unambiguous recognition of state sovereignty in Articles III and XVIII, without which approval of the Articles would have been politically impossible. The true nature of the proposal, however, lay in the phrases italicized above, the latent potential of which was not obvious to most eighteenth century minds unaccustomed to written constitutions and their interpretation, but which, after adoption, would be available for use to establish whatever degree of national supremacy might be necessary to curb democratic excesses in the states. The language of the draft, then, although it might convey one meaning to the lay mind, was readily adaptable by a skilled and trained legal ability to the support of an entirely different result.[3]

EARLY DEBATES

To justify their demands for independence, the radicals had opposed the sovereign political authority of the crown with the doctrine of the ultimate political authority of the people, and its corollary right of revolution. When independence was once declared, the conservatives were quick to turn this radical theory to their own use in advocating centralized authority. Thus it was argued that the people of the thirteen states constituted one collective people whose representative was Congress, from which it followed that Congress was superior to any state government, which represented only a portion of the sovereign people. In the debate on the Dickinson draft, in the summer of 1776, James Wilson thus expressed the conservative position: "It has

[3]That Dickinson was fully capable of such indirection is not to be doubted. It has been said of his earlier writing that he was able by "argument, subtle but clear" to derive "the nature of an act from the intention of its makers, and the intention of its makers from the nature of the act." Becker, The Eve of the Revolution 133 (1918).

been said that Congress is a representation of states; not of individuals. I say that the objects of its care are all the individuals of the states. . . . As to those matters which are referred to Congress, we are not so many states, we are one large state. We lay aside our individuality whenever we come here. "And Benjamin Rush, asserting that Congress represented the people, declared that "We are now a new nation" and assured the delegates that when in Congress he did not consider himself a citizen of Pennsylvania but a citizen of America. John Adams declared that the purpose of confederation was to "form us, like separate parcels of metal, into one common mass. We shall no longer retain our separate individuality . . . ."

The radicals responded by urging that what the doctrine of the sovereignty of the people really meant was sovereignty of the people organized into states, not a collective people organized into one nation known as the "United States." Members of Congress, therefore, were the representatives of the states from which they came. Roger Sherman of Connecticut specifically asserted that the delegates in Congress were the "representatives of states, not individuals." And John Witherspoon of New Jersey at this time made the distinction, later recognized in the Convention of 1787, between a national government which operated on individuals, and a federal union of sovereign states, and emphasized that it was the latter which Congress was engaged in creating, a system in which "Every colony is a distinct person."

The Dickinson draft was debated less than a month in July and August of 1776. Although the conflicting views of sovereignty were brought out as just indicated, these early debates centered largely on the questions of representation in Congress, apportionment of expenses among the states, and the disposition of the Western lands. It is interesting to note that these debates first revealed what was to be repeatedly demonstrated in subsequent American constitutional history, namely, the highly expedient nature of the "national" versus "state" sovereignty arguments. In the representation question, for example, the large states desired representation in accordance with population and supported their position by "national" arguments, and this was true even of those large states which, like Virginia, were for other purposes quite emphatic about state sovereignty. And on the question of the disposition of the Western lands, the states who had charter claims "to the South Seas" insisted on retaining their state sovereignty, whereas those states with definite boundaries advanced the argument that the lands were the common property of all, and that the Continental Congress had succeeded to British sovereignty to dispose of them. Again, the argument was not necessarily consistent with the position taken on other questions. In both instances, the "state sovereignty" position

prevailed. As to representation, the practice of the Continental Congress, that each colony should have one vote in the determination of questions, was retained in the draft of the Articles, with no consideration given to population. As to the Western lands, certain clauses in the Dickinson draft would have given Congress powers of "limiting the bounds of those colonies" claiming land "to the South Sea," of "assigning territories for new colonies" out of lands thus separated from the old colonies, and of "disposing of all such lands for the general benefit of all the United Colonies." These clauses were now eliminated.

THOMAS BURKE—THE FIRST STATES RIGHTER

In these early stages of the debates over the Articles of Confederation, however, it is generally true that the radicals do not seem to have realized the latent ambiguity of Sections III and XVIII of the Dickinson draft, nor appreciated their potent capacity for future centralization by construction. The conservatives, however, were not content to wait for the adoption of the Articles, which event might be long delayed or possibly never occur. Instead, they began immediately to seek to create precedents which would establish the superiority of Congress over the states. In so doing, they revealed their purpose and brought the attention of the radicals directly to the question of ultimate sovereignty. The eventual result, once the issue was squarely in the open, was that the Dickinson draft was drastically amended by curtailment of the powers of Congress to those which were expressly granted and by an unequivocal assertion of state sovereignty. The national government contemplated by the Dickinson draft was junked in favor of a compact between thirteen independent sovereignties. That such a complete turnabout occurred was due largely to the efforts and energies of a single individual, a brillant and toughminded man who so zealously led the fight against centralized authority that he may be appropriately called, without historical inaccuracy, the first states righter. He came to Congress in 1777 as a delegate from North Carolina and his name was Thomas Burke.

Burke is a much neglected figure in American history. He was born in Ireland about 1747, studied at the University of Dublin, and removed to North Carolina in 1771, where, after a brief career in medicine, he commenced the practice of law in 1772. He was a vigorous opponent of the Stamp Acts and represented Orange County in the North Carolina provincial Congress, in which he was a member of the committee which drafted the resolution authorizing North Carolina's delegates to the Continental Congress to declare independence. He also served as a member of the committee to draft a constitution for North Carolina. The committee, like the provincial Congress itself, was

divided into conservative and radical groups, and Burke was the ablest of the radicals who were advocating popular sovereignty, annual elections, separation of the organs of government, separation of church and state, and ratification by the people.

He was elected to the Continental Congress in December, 1776, appeared in February, 1777, and served until June, 1781, with the exception of the period from April, 1778, to August, 1778. His defeat in early April of 1778 was due to his having approved the appointment of a Pennsylvania officer to be brigadier over some North Carolina troops. Almost immediately an incident occurred, or more probably was engineered, by which he was enabled to recoup his political fortunes. On the night of April 10, in the course of a debate in Congress, Burke left the meeting hall, thus destroying the necessary quorum, and refused to return even though summoned by Congress. The next day, when Congress sought to discipline him, Burke stoutly maintained that for his actions in Congress he was accountable only to the people of North Carolina. Thereupon he left the Congress, returned home, laid his case before the North Carolina assembly, which promptly exonerated him. He was re-elected to Congress in August, after having established a pattern which Southern politicians follow to this day. In April, 1781, Burke was elected governor of North Carolina, and immediately commenced the mobilization of troops and materials with great vigor. He was captured by the Tories in September, 1781, escaped in January, 1782, returned and resumed his duties as governor. The accounts vary as to whether he refused to run for re-election or whether he ran and was defeated. He died the next year at the age of around 37. But during his approximately ten years in public life he altered, even though temporarily, the main course of American history.

Burke had barely arrived in Congress in February, 1777, when an occasion arose which revealed his extreme sensitivity to any suggestion of encroachment upon what he considered to be state prerogatives. In an effort to bolster lagging attendance in Congress, a motion was made which, as amended, would have authorized the presiding officer to make a written request for fuller representation from any state whenever the number of representatives fell below three. Burke, with courtesy but firmness, objected. He stated that he considered it "a matter which each state had an exclusive right to judge of," and that he "could not agree that Congress should at all interfere with it." Furthermore, since Burke at the time was the only delegate present from North Carolina, he said he "considered the amendment relative to three as implying a censure on his country and he must therefore protest against it." In the face of this stout defense, "The intention to censure was disclaimed" and the motion was defeated. This was the man,

then, who became alerted to the purpose and design of the conservatives in the Dickinson draft and who, more than any other, frustrated it.[4]

NATIONAL VS. STATE POWER

Burke's suspicions were excited immediately upon his arrival in Congress by a debate on a motion which took place on February 4, 1777. In December, 1776, the New England states, faced with invasion, had held a meeting at Providence for the purpose of discussing the war effort and developing plans to support it by collective action. A report of this meeting was sent to Congress, where James Wilson promptly moved to consider whether the meeting was a proper one and whether it needed the approval of Congess to make it valid. Burke saw clearly the purpose of the motion, for he reported that "Maryland and Pennsylvania were very solicitous to procure a vote of Congress . . . to the end that this approbation might imply a right to disapprove." In support of the motion, Wilson argued that the purpose of the committee of the New England states in sending the report to Congress had been to obtain approval and that "the business the committee transacted was wholly *continental* and of course required the approbation of Congress." John Adams asserted that "the four New England states bore the same relation to the Congress that four counties bore to a single state" and that while the states had the right to deal with local matters such as roads and poor laws, "they have no right to touch upon continental subjects . . . ." And Benjamin Rush thought that the New England meeting "should be regarded with a serious and jealous eye. Their business was chiefly continental, and therefore they usurped the powers of Congress . . ."

The radicals, of course, opposed the motion. Sam Adams maintained that "a right to assemble upon all occasions to consult measures for promoting liberty and happiness was the privilege to freemen"—a liberty that was "dreaded only by tryants." Arguing more legalistically, Richard Henry Lee pointed out that "we were not yet confederated—therefore no law of the Union infringed." Thomas Burke "refused to say what his state could not do, declaring he thought she could do every thing which she had not precluded herself from by plain and express declaration; to yield up any of her rights was not in his power, and very far from his inclination . . . ." The result of the "long metaphysical debate" is not exactly clear. Burke reported that "the approbation was denied" and that he voted against it "lest its ambiguity should create further disputes." The general opinion, according to Burke,

[4]The foregoing summary of Burke's career is based on accounts in the Dictionary of American Biography and the Encyclopedia Americana.

was that "Congress had no right to prohibit meetings, or censure them if the transactions in them were not injurious to others," but that Congress did have "a right to inquire into the causes of any meeting" and "to know what was transacted." On the other hand, William Ellery of Rhode Island reported to his governor that "Congress were equally divided. All the members agreed that the meeting was right considering the circumstances" (communications with Congress were interrupted) "but split upon the question of right hinted at."

On February 25, 1777, another incident occurred in which the conservatives sought to aggrandize the powers of Congess. Congress had before it a report on desertion, which in its original form recommended that the states enact laws empowering constables and others to take into custody suspected deserters and carry them before a justice of the peace. To this report the conservatives offered a significant amendment, as Burke recorded it, that "the power should go immediately from Congress—without the intervention of the states. Many gentlemen were inattentive and it passed." Burke thereupon demanded that his dissent be entered upon the Journal. As Burke interpreted the amendment, "Congress was herein assuming a power to give authority from themselves to persons within the states to seize and imprison the persons of the citizens" and to Burke this was "thereby to endanger the personal liberty of every man in America." He stated that he was "not apprehensive of any injury from it in the state which he represented because it would never there be observed . . . but that as it was as much as his life was worth to consent to the Congress exercising such a power, he desired that he might be able to prove from the Journal that he did not." A motion was then made to reconsider, and a debate followed in which the chief protagonists were Burke and James Wilson. Wilson argued that Congressional authority extended to all matters of continental concern, which the army certainly was, that preventing desertion from the army was as necessary as raising it, and that Congress had power to authorize persons to execute Congressional measures for prevention of the evil.

Burke's lengthy reply reflected the radical philosophy of distrust of centralized power. Although he admitted that continental objects were the proper subjects of Congressional concern, he denied that measures of Congress were to be enforced by Congressional authority. That "would be giving Congress a power to prostrate all the laws and constitutions of the states because they might create a power within each that must act independently of them, and might act directly contrary to them" and "by virtue of this power render ineffectual all the barriers provided in the states for the security of the rights of the citizens for if they gave a power to act coercively it must be against

the subject of some state, and the subject of every state was entitled to the protection of that particular state, and subject to the laws of that alone . . . ." He maintained that "the states alone had power to act coercively against their citizens, and therefore were the only power competent to carry into execution any provisions whether continental or municipal." Interpreting the amendment to recognize in Congress, not merely the power to authorize the apprehension of deserters, but also the power to appoint persons to decide who were deserters, Burke declared that "If the Congress has the power to appoint any person to decide this question the Congress has power unlimited over the lives and liberties of all men in America . . . ." Furthermore, the North Carolina Constitution provided that no man should be proceeded against "but under the authority of the laws of the state" and Burke declared that "no magisterial authority would be given, but by the legislature . . . ." The proposed authority could not be exercised in North Carolina if that state's "Bill of Rights and Constitution were of any effect, and not mere waste paper." Burke insisted that "civil authority must be derived from the state and not the Congress, and the rules and limits whereby it was to be exercised must be expressly laid down by the states and could not be altered or extended by the Congress unless they had a power over the internal laws of the states which power never would be given . . . ." In the face of such a vigorous defense of state authority, with which a majority of the delegates were unquestionably in agreement, Wilson was forced to back down.

The very next day a "peevish altercation" occurred over the question of an adjournment from Baltimore to Philadelphia. Burke moved, on behalf of North Carolina, to put off the question. The rule of the Congress was that voting was by states, with each state having one vote. James Wilson, John Adams and others now asserted that a majority of Congress, rather than a majority of the states, should decide whether the rule should apply in the instance of adjournment, and whether North Carolina could move for postponement. Burke noted that "a fierce debate ensued." Richard Henry Lee "urged the violent impropriety of putting such a question at a time when a state attempted to avail itself of a privilege reserved to each by the original rules of the Congress which certainly formed its Constitution . . . ." Haywood of South Carolina thought it "a very extraordinary kind of proposition to submit to a majority whether that majority should be checked by a power absolutely reserved for that purpose . . . ."

As for Burke, he flatly declared that "he would enter no debate on the subject whether he should avail himself of a right which was reserved to every state in the original Constitution of the Congress . . . . If a majority of the Congress could vote away the rules of the Congress,

then they were a body governed by no rule at all but only by arbitrary discretion, that if this was the case, no state was secure, since a majority might vote that two or three states could form a Congress, although the rule required nine, and that the vote should not be by states but by voice individually." Even to proceed to a vote on the question Burke would consider "a most violent invasion of the right of his state . . . that if the question was at all put he should be at no loss how to conduct himself." He said that "he hoped he should always have firmness enough to maintain even the smallest privilege of the state he represented, that gentlemen were exceedingly mistaken if they deemed him a man who would tamely suffer an invasion or encroachment on its rights, that, if the assembly proceeded to so arbitrary and tyrannical an exertion of power he would consider it as no longer that which ought to be trusted with the liberties of their fellow citizens, and he would shape his conduct accordingly." In his strenuous protest he was joined by other states, and as he reported it, "perceiving the determined resolution of North Carolina to withdraw from Congress if any such question should be put, they waived their opposition, and he exercised his right."

These experiences during his first month in Congress made a profound impression upon Burke. On March 11, 1777, he put his feelings in a letter to Governor Caswell of North Carolina. "The more experience I acquire, the stronger is my conviction, that *unlimited power can not be safely trusted* to any man or set of men on earth. No men have undertaken to exercise authority with intentions more generous and disinterested than the Congress . . . . What can induce such men to endeavor at increasing the power with which they are invested . . . . This is a question I believe cannot be answered but by a plain declaration that power of all kinds has an irresistible propensity to increase a desire for itself . . . I hope, sir, you will pardon me these reflections . . . but I find my attendance in Congress, short as it has been, obtrudes them on me every day. Great part of our time is consumed in debates, whose object on one side is to increase the power of Congress, and on the other to restrain it . . . . These and many other considerations make me earnestly wish that the power of Congress was accurately defined and that there were adequate check provided to prevent any excess." And referring to the adjournment controversy, Burke added, "The last matter in the abstract will show you that even thus early, men so eminent as members of Congress are willing to explain away any power that stands in the way of their particular purposes. What may we not expect some time hence, when the seat of power shall become firm by habit, and men will be accustomed to obedience, and perhaps forgetful of the original principles which gave rise thereto."

STATE SOVEREIGNTY PREVAILS

Thus it was, when Congress in April, 1777, resumed its consideration of the Articles, that it was Burke who realized the potential danger in the Dickinson draft to the sovereignty and independence of the states. The third article, in Burke's words, "expressed only a reservation of the power of regulating the internal police, and consequently resigned away every other power." To him this meant that "it left it in the power of the future Congress or General Council to explain away every right belonging to the states and to make their own power as unlimited as they please." Burke added that "It appeared to me that this was not what the states expected . . . ."

Realizing the situation, he moved boldly to deal with it by proposing an amendment which utterly transformed the character of the Articles and completely reversed the contemplated power relation between the central authority and the states. In Burke's words, "I proposed, therefore an amendment, which held up the principle, that all sovereign power was in the states separately, and that particular acts of it, which should be expressly enumerated, would be exercised in conjunction, and not otherwise; but that in all things else each state would exercise all the rights and power of sovereignty, uncontrolled." And thus the fundamental issue was put squarely before the Congress. What was to be the distribution of power between Congress and the states? More specifically, was ultimate political sovereignty to reside in the central or in the state governments?

In his penetration of the matter, however, Burke was ahead of the delegates, and the tremendous import of his proposal was not immediately realized. Burke reports that his amendment "was at first so little understood that it was some time before it was seconded, and South Carolina first took it up." Opposition to the amendment came principally from James Wilson. But with the issue thus nakedly drawn and clarified by Burke, the result was not unexpected in a Congress in which the radicals were in the numerical majority. Burke was "much pleased to find the opinion of accumulating powers to Congress so little supported" and found his "ideas relative thereto nearly similar to those of most of the states." The vote on Burke's amendment was eleven in favor, one against, and one state divided. Strangely, the one state which opposed it was Virginia. In its final form, the amendment appeared as Article II of the Articles of Confederation: "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." And thus was the crucial question settled in favor of state rather than national supremacy.

Other modifications of the Dickinson draft then followed in the same direction. The language of Article XVIII previously referred to disappeared completely. Article II of the Dickinson draft had begun by stating that "The said Colonies unite themselves so as never to be divided by any act whatever." This clause, emphasizing a permanent nationality, was now struck out by the radicals. The provision relating to regulation of trade underwent significant alteration. In the Dickinson draft, the states were expressly prohibited from levying duties or imposts which would interfere with treaties made by Congress. As amended, Congress' sole and exclusive power to enter into treaties and alliances was modified by adding provisos that no commercial treaty should restrict any state from prohibiting exports and imports, or from imposing such imposts and duties on foreigners as the state's own citizens were subject to. The practical effect of the amendment was that Congressional power to make commercial treaties was distinctly subordinate to trade regulation by the states.

The Dickinson draft would have created central authority to settle disputes between individual states by granting to Congress "sole and exclusive right and power" of "settling all disputes and differences now subsisting, or that hereafter may arise between two or more colonies concerning boundaries, jurisdictions or any other cause whatever." This central power to settle disputes as of right was amended to provide merely that Congress should be the "last resort on appeal" only when petition was made to it by a state. A cumbersome procedure was set forth by which a decision could be reached, but there was no method provided for enforcing any decision. Rather than issuing binding judgments as had been contemplated, Congress became an arbitrator whose awards were not necessarily binding upon the states. And for the benefit of those states with land claims, a proviso was added that no state should be deprived of any territory for the benefit of the United States, thus refuting the nationalist theory already mentioned that Congress had inherited sovereign power over the Western lands from Parliament.

The provision which would have created what might be called an executive branch underwent almost complete transformation. Under the Dickinson draft, Congress was to create a "Council of States, and such committees and civil officers as may be necessary for managing the general affairs of the United States, under their direction while assembled, and in their recess, of the Council of State." The Council's powers, set forth in a separate article, were to have charge of military and naval operations while Congress was not in session, make contracts, draw upon the money in the treasury, superintend and control civil and military officers of the United States, prepare matters for the

consideration of Congress, and even to summon Congress into session earlier than the appointed time if deemed necessary. It seems clear that the Dickinson draft contemplated the creation of a permanent executive body, and the above listing of its powers amply indicates its potential capacity for centralization. As amended, the "Council of State" became the "Committee of the States," the very title indicating the change in emphasis. Instead of having the power to control committees, it became one itself. Instead of being a permanent body, it became one which sat only when Congress was not in session. Instead of numerous expressly granted powers, it ended up with no powers specifically delegated. It was only to have such power as nine states in Congress might agree to grant it, but Congress was prohibited from vesting it with any of those powers the exercise of which required the assent of nine states, that is, the really important ones. All of these emasculating amendments were, of course, an accurate reflection of the radicals' distrust of any strong executive authority.

And so it was that the great issue was resolved. The Articles as originally drafted by the conservatives would have created a central government of virtually unlimited power to which the states were distinctly subordinate. What finally emerged, after amendment by the radicals, was a compact between sovereign states, a compact which created a central agency with expressly delegated and strictly limited powers but with no independent means of enforcing them, a compact in which the ultimate power, including the vast area of unenumerated and undefined powers, was retained by the states themselves. In later years this was recognized judicially by the United States Supreme Court, although the Court, as did the Articles themselves, used the term "league" instead of "compact." Speaking for a unanimous court in *McCulloch v. Maryland*,[5] Chief Justice Marshall stated that "To the formation of a league, such as was the confederation, the state sovereignties were certainly competent."[6] And in *Gibbons v. Ogden*,[7] again for a unanimous court, after adverting to the fact that counsel had made reference to the political situation of the states prior to the Constitution, Marshall stated: "It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true."[8] Years later in *Kentucky v. Dennison*,[9] Chief Justice Taney asserted for the court that "the confederation was only a league of separate sovereignties, in which each state, within its own limits, held and exercised all the powers of sovereignty; and the con-

5 4 Wheat. 316 (1819).
6 Id. at 404.
7 9 Wheat. 1 (1824).
8 Id. at 187.
9 24 Howard 66 (1861).

federation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a state."[10]

It is readily seen, therefore, that the perennial American struggle between "nationalism" and "states rights" was not fought first between Webster and Calhoun, nor even between Hamilton and Jefferson. It began before there was a Constitution, in the Continental Congress in the drafting of the Articles of Confederation. And in this first contest, the "states rights" position won a resounding victory, one which was almost the personal accomplishment of one man, Thomas Burke of North Carolina. On May 2, 1777, Burke could write with high satisfaction to his governor reporting an incident in which a captain of a continental ship was suspended from his command by Congress for having insulted the governor of Maryland. "Every gentleman (a few only excepted) seem to feel his own state injured in this insult, and they are determined that nothing less should do, than what would satisfy Maryland, and convince officers that they were very inferior to the magistrates of the states, and must treat them with the most profound respect. I never had more hopes of Congress than I have now."

STATE SOVEREIGNTY DURING THE REVOLUTION

While the Articles were before the states awaiting ratification, the war continued under the direction of the Continental Congress. Consideration of the conduct of military operations leaves little doubt that the states were de facto sovereign during the period prior to the adoption of the Articles in 1781. As a matter of fact, the war for independence almost foundered due to the lack of centralized power and an excessive attachment to state sovereignty. Washington was appointed by Congress to be commander-in-chief of the Contintental Army on June 15, 1775. Throughout the war, the existence of his army depended upon voluntary enlistments and troops supplied by the states. Enlistments were of short duration and never sufficient, while the quotas assigned to the states by Congress were almost never met. The states, fearful of the existence of a strong army operating under a central authority, maintained their own militias which drained available manpower. Congress in 1775 had set the size of the Continental Army at 20,000, but the peak strength ever attained under a single commander during the entire war was in the summer of 1776 when, in the first bloom of patriotic ardor, Washington had 14,000 troops fit for duty. Before the year was out the number had dwindled below 5,000. And less than six months before Yorktown, Washington noted in his diary that scarcely a single state had one-eighth of its quota in the field.

[10]Id. at 103.

From Washington's point of view, what was desperately needed, so far as the Army was concerned, was that "every matter which relates to it should be under the immediate direction and providence of Congress." He said that he did not know sometimes whether he was commanding one army or thirteen armies. But the power which was necessary—the power to draft men into the Continental Army—was one which Congress did not have, and further, was one which Congress, composed largely of radicals, was not disposed to seek since they considered it to be an attribute of state sovereignty. Congress, as a matter of fact, had little sympathy with Washington's efforts to destroy state distinctions in the Continental Army, and when a committee which returned to Congress in 1780 from a visit with Washington sought to impress Congress with his views, they were charged with being "too strongly tinctured with the army principles."

On one occasion Washington bitterly wrote that if he had possessed a permanent national army from the beginning, "we should not have been for the greater part of the war inferior to the enemy, indebted for our safety to their inactivity, enduring frequently the mortification of seeing inviting opportunities to ruin them pass unimproved for want of a force which the country was completely able to afford, and of seeing the country ravaged, our towns burnt, the inhabitants plundered, abused, murdered, from the same cause." And a noted historian of the period has stated that "If we were to take from Washington's writings those letters in which he complains of the evil results of the compromises between Congress and the states in military affairs, we should reduce his correspondence during the Revolution by almost a fourth; and beyond doubt, if he had possessed a Continental Line of 20,000 men, well-trained, well-officered, and serving for the whole conflict, the war would have ended years before it did."[11]

The almost disastrous effects which ensued from the necessary dependence on the states were manifest also in the case of supplies. Again the pattern was that the states were forever delinquent in their quotas, and again there was no adequate central power to remedy the situation. Volumes of correspondence flowed back and forth between Congressional supply officers and the states. But there was never a period of three months when Washington did not have to complain of supply shortages, and it was a common plight not to have more than a day's provisions in camp. Many "patriotic" farmers sold their provisions to the British for gold, rather than to the army for Continental paper money. Congress could not, and the states would not, prevent it. In 1779 Congress summarized it very well in a circular for transmission to the states which stated that "The inattention in the states has almost

[11]Nevins, supra note 1 at 611.

endangered our very existence as a people." Feelings of state sovereignty were so deep, however, that the circular was never approved or transmitted. Throughout the war, the conservatives repeatedly warned that victory could never be attained unless Congress were granted more power. In this they were eventually proved wrong, but there is no doubt that the independence of the states and the weakness of the central authority did, in fact, prolong the war.

STATE SOVEREIGNTY UNDER THE ARTICLES

The inadequacy of the Articles of Confederation to meet the needs of the time has always been a commonplace in American history. The years between 1781 and 1789 have repeatedly been depicted as a period of increasing political ineptitude and weakness at home, and steady deterioration in status and prestige abroad. And historians have had no difficulty in agreeing on the root of the difficulty—the fact that there was no competent central government with adequate power to do what was needed, and even more important, possessed of some means of enforcing even what limited powers it did have against the repeated recalcitrance of sovereign states. The failures of the Articles of Confederation to provide an effective system of government and the failures of the attempts to improve them have been delineated over and over again.

The conservatives, of course, had been dissatisfied from the beginning with the lack of centralized power. Being in the minority in Congress in 1776 and 1777, they had been defeated, as we have seen, in their efforts to increase central authority over the states, first by precedent and implication and then in the drafting of the Articles. Although the radicals had achieved their victory through colony-wide cooperation, primarily they were interested in the politics of their own state and local governments. Consequently, once they had won the day for state sovereignty, generally speaking they devoted their energies to local matters rather than to Congress, and failed to maintain the organization which had brought about their triumph. The effect of defeat on the conservatives was just the opposite. Their nationalist ambitions continued and they redoubled their efforts to realize them. Throughout the period 1776-1789 they kept up a steady drumfire of criticism of the debility of the government and laid responsibility for all political, social and economic ills on the lack of sufficient central authority. In 1781, when the Articles were ratified, the influence of the conservatives was ascendant in Congress, and as was naturally to be expected, they immediately began a campaign to expand Congressional power.

As noted, the Articles required that for the most important actions of Congress, the assent of nine states was required. This meant that with nine states present, one state could outvote eight, and if less than

nine states were present, Congress could not vote at all. This provision, furthermore, was clear and unambiguous and not susceptible to being avoided by interpretation. On all questions other than those requiring nine votes, however, the Articles provided for determination "by the votes of a majority of the United States, in Congress assembled." If this could be interpreted to mean a majority of the states who were present at a particular time rather than a majority of all the states, then Congress might function more effectively. James Madison had just come to Congress as a delegate from Virginia, and it was he who, four days after the official ratification of the Articles, led a group which advanced the construction that only a majority of a quorum was necessary under this clause.

The opposition to this argument was led, naturally enough, by the war horse of state sovereignty, Thomas Burke. Burke recalled the debates when the Articles were being drafted and when Congress had clearly indicated its intent to require seven votes in all cases that did not require nine. In typical fashion, Burke warned that if Congress "attempted so early to claim powers that were not expressly given by that charter, or began to pervert it to increase their power, they would give a dreadful alarm to their constituents who are so jealous of their liberty." After a two-day debate, again Burke's view prevailed. The result was to fasten minority rule on all Congressional action, and by requiring seven affirmative votes, to make absenteeism a negative weapon. Madison's biographer states that "as an effective lawmaking and executive body, the United States in Congress assembled died right there and then, at the age of six days."[12] Burke, who was to leave Congress a month later to become governor of North Carolina, had stayed long enough to strike one last telling blow against centralized power.

As we have seen, the essential nature of the Articles was best revealed in Burke's brainchild, Article II, reserving to the states every power, jurisdiction and right which was not "expressly delegated" to the United States. Article XIII, however, provided that "Every state shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them." By this provision, Madison argued, "a general and implied power is vested in the United States in Congress assembled to enforce and carry into effect all the articles of the said confederation against any of the states which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said articles." No specific provision existed, however, to enforce this implied power. Because it was "most consonant to the spirit of a free constitution"

[12]Brant, James Madison: The Nationalist, p.107 (1948).

and, more practically, because he realized it was futile to proceed any other way, Madison sought an amendment to the Articles.

In May, 1781, a committee which he headed, recognizing that the principal defect in the Articles was the lack of an enforcement power in Congress, reported a scheme which, if adopted, would really have put teeth in the Articles. The bold and drastic remedy advanced, whenever one or more states refused to abide by the decisions of Congress or to observe all the Articles, was that Congress should then be authorized to "employ the force of the United States as well by sea as by land" to compel such states to fulfill their federal obligations, and also to make distraint on the property of the states or its citizens, and to cut off its trade with the rest of the United States and the world. The fate of this report, alarming as it was to the state sovereignty delegates, was to be referred to another committee, which shelved it and came up in July with a timid plan of its own. This in turn was referred to still a third committee which in August proposed what was really a well-considered plan for patching up the Articles by seven additional articles increasing the powers of Congress. But no action was ever taken. One final effort was made in October by still a fourth committee to obtain a temporary increase in Congessional power, but the surrender of Cornwallis relieved any sense of emergency and again the matter was dropped.

The problems of peace, however, no less than the problems of war, provided nationalists with ample evidence that a compact of independent states, not subject to any coercive central authority, was a fundamentally defective governmental system. The deficiency was most apparent in the three areas of revenue and finance, regulation of trade, and foreign relations.

During the war, Congress had operated financially on a precarious hand-to-mouth basis, obtaining its funds principally by loans obtained in France and Holland, private loans in America, requisitions from the states, and the issuance of paper money. The army was disbanded with a commutation of payment for which certificates were issued. In 1783, therefore, the public debt amounted to roughly forty-two million dollars, with annual interest of around $2,400,000. It was obvious that if Congress was to maintain its credit, indeed if the confederacy was to operate at all, it must have money. In February, 1881, even before the Articles were ratified, Congress asked the states for the power to levy a five per cent duty on all foreign imports, the income to be used to pay existing debts, interests and accruing obligations. This proposal was approved by some states as requested, and approved by others with conditions. But it eventually foundered on the unanimous consent requirement for the amendment of the Articles. Rhode Island would not

consent on the ground that the existence of such a power in Congress would be a threat to her liberties as a sovereign state. And Virginia, which had earlier consented, now reneged for fear that her state sovereignty would be fatally impaired by granting the power requested.

Pending the action of the states on the impost request, Congress in October, 1781, made a requisition upon the states for eight million dollars for the coming year. In January, 1783, a year and three months later, less than half a million had been paid. Robert Morris, conservative leader and superintendent of finance, depicted his plight as follows: "Imagine the situation of a man who is to direct the finances of a country almost without revenue (for such you will perceive this to be) surrounded by creditors whose distresses, while they increase their clamors, render it more difficult to appease them; an army ready to disband or mutiny; a government whose sole authority consists in the power of framing recommendations." Writing to Washington in February, 1783, Morris conceded that Congress wanted to do the right thing but that its members were "afraid of offending their states."

In April, 1783, with the situation becoming increasingly desperate, Congress tried again. The plan this time requested the states to vest in Congress the power, for a limited period of twenty-five years, to levy a duty on foreign imports, the money to be used exclusively to discharge the public debt and interest, the duties to be collected by collectors appointed by the states, but acting under orders of Congress. In addition, the states were requested to establish for twenty-five years a substantial and effectual revenue, by what ever means each state desired, out of which each state would pay it proportionate share of $1,500,000 annually. But this proposal fared no better than its predecessor. The truth was that the public debt was another issue involving the politics of national as opposed to state power. The conservatives saw the nationalization of the debt as a step toward a strong central government, since it would require an independent source of national income and at the same time would consolidate the creditor class behind the central government, rather than the states. The radicals saw it as the opening wedge in the ultimate destruction of state sovereignty and local democracy. Their plan was to divide the public debt among the states and let the states pay it. The result was that three years after the proposal was submitted by Congress only two states had accepted the proposal as it was offered, seven states had accepted with varying conditions, qualfications, and reservations, and four states never approved any part of the plan.

In 1786, when Congress again appealed helplessly to the states to approve the plan, the country was virtually bankrupt. The foreign debt had increased by almost three million, and the unpaid interest was rapidly rolling up on the domestic debt. Between October, 1781, and

the beginning of 1786, Congress had requisitioned from the states a total of $15,670,000. Of this amount the states had paid only $2,419,000—and two states had paid not a penny. In February of 1786, a committee of Congress reported that "The crisis has arrived when the people of these United States, by whose will, and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation, by maintaining the public faith at home and abroad; or whether, for want of a timely exertion in establishing a general revenue, and thereby giving strength to the confederacy, they will hazard not only the existence of the nation, but of those great and invaluable privileges for which they have so arduously and so honorably contended."

The story was similar with regard to the regulation of trade and the effort of Congress to obtain sufficient power to protect American commercial interests against competition and discrimination. With the war over, British made goods poured into the country, competing with infant home industries and draining the country of specie. While this trade was being carried on in British ships, American ships were at the same time prohibited by Britain from engaging in the West Indies trade. The first defensive reaction to this commercial warfare was the enactment of state legislation, but it quickly became apparent that state jealousies against each other and the lack of uniformity in the state laws made this a frail and unsuccessful remedy. Again, what was needed was effective national action, but the Congress was without power under the Articles to take such action. Accordingly, in April, 1784, Congress submitted to the states a request for power to pass navigation acts to prohibit the importation or exportation of any goods in or ou of any American port in vessels owned or operated by the subjects of any power with whom the United States did not have a treaty of commerce. Congress also asked for power to prohibit foreigners from importing goods from any country but their own. This grant of power was to be for the limited period of fifteen years.

While this request for sorely needed authority was pending before the states, Congress, late in 1784, received from James Monroe a committee report which made a far-reaching recommendation for an amendment to the Articles. The proposed amendment would have granted to Congress perpetual power to regulate trade with foreign nations and between the states and to lay duties on imports and exports. The amendment was studded with concessions to state sovereignty, but even so, state fear of a strong central government was too strong and the amendment was not even approved by Congress for submission to the states. This quick death was just as well, for in March, 1786, the 1784 Congressional request for a fifteen year power had met the usual

fate in the states. Only four states had consented to the request as framed by Congress, six states had conditioned their consent upon amendments and restrictions which they had added to Congress' proposal, and three states had taken no action whatever. In October, 1786, Congress issued another futile appeal to the states for favorable action, which was still pending when the Confederation came to an end.

Whereas the Articles did not confer upon Congress either the power of taxation or the power of regulating trade and commerce, they did specifically provide that Congress should have "sole and exclusive" power of determining peace and war, and of entering into treaties. And as has been noted, each state bound itself to abide by Congress' determination on all questions submitted to Congress by the articles. Thus, even though the states were unwilling to grant new taxation and commercial powers to Congress no matter how urgently needed, it might have been reasonably expected, when Congress acted within its expressly delegated powers, that the states would fulfill their solemn pledges. As it turned out, sovereignty meant more to the states than the fulfillment of their commitments under the Articles.

By the treaty of 1783, England recognized the independence of the former colonies and agreed to a prompt withdrawal of British troops from within stipulated boundary lines. The fourth article provided that creditors on either side should meet with no lawful impediment to the recovery of their debts at full sterling value. The fifth article required Congress to recommend to the states restoration of all property confiscated from British subjects who had not borne arms against the United States. Persons of any other description—this would include loyalists who had not borne arms—were to have full liberty to go anywhere in the United States and remain unmolested for a year for the purpose of recovering their property. The sixth article declared that no further confiscation of British or loyalist property, or any further prosecution of loyalists, should take place. In 1786, John Jay, conservative leader and Secretary of Foreign Affairs since 1783, made a succinct summary of the ensuing situation. According to Jay, there had not been a single day since the ratification of the treaty on which it had "not been violated by one or other of the States." In many southern states laws preventing British creditors from collecting debts, or recovering other property, were continued in force after the treaty and even amplified. The Governor of Virginia ordered all British subjects and loyalists to leave the state. In many places riots against the loyalists took place. New York enacted a Trespass Act under which British subjects, relying on the treaty and remaining after the peace, were faced with trespass actions and confronted with heavy verdicts for damages. Meanwhile, Great Britain refused to withdraw from the lake and western

posts as the treaty required, taking the position that she would fulfill her treaty obligations when the United States would fulfill hers.

In the midst of these flagrant violations of the treaty, done under the authority of state sovereignty, conservative nationalists assumed the role of defenders of the constitutional prerogatives of Congress. In 1784 Hamilton argued in court in New York that the Trespass Act was invalid on the ground that it was in violation of a treaty which was superior to state law since it was made under a constitutional power of Congress "not controllable by any State." In 1786 Jay sought to persuade the states that they were bound by the treaty. "Your secretary considers the thirteen independent sovereign states as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate (except by their delegates) or have concurrent jurisdiction. . . . When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures." And in the spring of 1787 Congress resolved in emphatic language "that the legislatures of the several States cannot of right pass any act or acts for interpreting, explaining, or construing a national treaty, or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding, or counteracting the operation and execution of the same; for that on being constitutionally made, ratified, and published, they become in virtue of the Confederation, part of the law of the land, and are not only independent of the will and power of such Legislatures, but also binding and obligatory on them."

But such brave resolves amounted to no more than a combination of political propaganda and hopeful optimism in the absence of any coercive power to make them effective. The actual respect accorded to the treaty was revealed not only by the repeated infractions of it by the states but also by a resolution of the New York legislature which stated "That while this Legislature entertain the highest sense of national honor, of the sanction of treaties, and of the deference which is due the advice of the United States in Congress assembled, they find it inconsistent with their duty to comply with the recommendation of the said United States, on the subject matter of the fifth article of the said definitive treaty of peace." And thus was the "sole and exclusive power" of Congress of entering into treaties reduced to mere "advice" and "recommendation" which sovereign states were free to contemptuously ignore with complete impunity. The lack of centralized power in foreign relations was further revealed in embarassing fashion by the

depredations upon American shipping in the Mediterranean by the Barbary powers. As a condition for the operations of American ships in what these piratical states considered their lake, they demanded extortion payments under the guise of treaties and backed up their demands by repeated seizures of American vessels and imprisonment of American seamen. Negotiations were unsuccessful with hardbitten rulers who respected only wealth and power. Too poor to pay and too weak to fight, America could only suffer the continued humiliation, and the nationalists were given another reason for insisting on the need for greater power.

In ways other than those already discussed the states manifested their sovereign indifference to their obligations under the Articles and to the Congress, even within its own legitimate area of authority. Contrary to the specific prohibitions of the Articles, the states engaged in war with the Indians, concluded treaties, engaged in diplomatic negotiation with foreign nations, organized their own navies, fitted out their own armies, and formed political compacts with each other. In the Constitutional convention in 1787 James Madison, at that time a nationalist, was to ask: "Has not Georgia, in direct violation of the Constitution, made war with the Indians and concluded treaties? Have not Virginia and Maryland entered into a partial compact? Have not Pennsylvania and New Jersey regulated the bounds of the Deleware? Has not the state of Massachusetts at this time a considerable body of troops in pay?"

The states were continually lax in maintaining their delegations in Congress. Under the rules of the Articles requiring two delegates for a state to vote, the concurrence of nine states for most important actions and a majority of seven for all others, this frequently meant that Congress was unable to function at all. Between October, 1785, and April, 1786, for example, there were only three days when as many as nine states were represented in Congress. The declining respect for Congress was reflected in the declining quality of the delegates. Whereas the Continental Congress before and during the Revolution had contained the cream of colonial leadership, the Congresses under the Articles, with some notable individual exceptions, were made up of men of mediocre ability. Men of outstanding powers of leadership preferred to exercise their talents where the centers of real power existed—in the states. Congress repeatedly urged and prodded the states to improve their representation in Congress, but in this, as in all other matters, to use Robert Morris' phrase, "talking to the states (was) like preaching to the dead."

Unwilling to grant additional power to Congress or even to respect the powers the Articles actually gave it, and refusing to observe the

limitations expressly placed upon them by the Articles, the states went their own disparate ways, each legislating in its own self-interest. The states in which the ports of entry were located laid duties upon foreign imports for their own enrichment and to protect domestic commerce. In retaliation, the states thus disadvantaged laid taxes of their own upon interstate commerce. The result, as pictured by conservatives, was a series of retaliatory trade wars and a mass of state legislation which hampered and restricted the free flow of commerce throughout the country. As James Madison put it: "New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." The situation was exacerbated by the monetary confusion which resulted from the lack of a uniform currency. The specie of many nations was in circulation, but the value fluctuated sharply from state to state. There were voluminous tables of exchange which encumbered all business transactions and made calculation of value an arithmetical problem of real dimension. Furthermore, counterfeiting was widely practised, and the clipping of coin was so prevalent that Washington complained unless something were done a man would be forced to travel with a pair of money scales in his pocket. The difficulty was increased by the unreliability and fluctuating value of the paper currencies of the various states.

The currency problem was but one aspect of the social, economic and political struggle which was constantly being waged within the states between conservatives and radicals. Throughout the period from 1776 to 1789 the radicals, whenever they were in control of a state legislature, enacted laws in furtherance of their own economic interests and against that of the conservatives. The laws to which conservatives were most opposed were those which favored debtors as against their creditors, and the demand for such legislation was increased when the post-war boom was followed by an economic depression in 1784. The radical legislation was of various kinds. There were laws which required creditors to settle obligations by the tender of property instead of money. There were laws which granted such liberal extension of time for the payment of debts as to amount virtually to indefinite moratoria. There were laws which prohibited the foreclosure of mortgages. There were laws which closed the courts of the state to suits by creditors against debtors. All of these laws, of course, were in derogation of contracts entered into prior to their passage and limited the enforcement of all contracts, past and future.

It was the paper money laws, however, which men of property probably considered to be most subversive of their interests and, indeed the interests of society itself, although quite naturally they identi-

fied the two. Throughout the states there was a constant demand by debtors for the issuance of paper money which would be legal tender for debts. Seven states at one time or another succumbed to the paper money agitation. Each additional issue, of course, further depreciated the value, and exposed creditors to complete or partial losses on their loans or commodities. The pressures of the debtor classes for remedial legislation were manifested not only by the favorable responsive action in many states but also by the willingness to resort to direct action when legislatures under conservative control failed to act against the interests of creditors. Thus, the armed outbreak in Massachusetts known as Shays Rebellion, was a conflict in which bands of farmers, debtors and malcontents sought to coerce the passage of radical legislation by forcibly closing the courts in much of the interior of the state and even threatening to lay siege to Boston. The uprising was finally overcome, but not without causing consternation and alarm in the minds of conservatives over the very foundations of society.

Six years, then, after the Articles had been ratified, and four years after the treaty of peace had been signed, conservative nationalists were able to describe a scene in which national finances were in a state of practical bankruptcy; national honor was flaunted by treaty violations, and foreign commerce was prey to discrimination and piracy; a central government which was no government at all, but a debating society of inferior men; a Congress which was constantly humilated and degraded and ignored by the states, who would not grant it the powers it needed nor respect the powers which it had; states which violated with impunity restrictions placed upon them in a constitution created by them and which they had sworn to obey; commerce and trade restricted and hampered by conflicting and retaliatory state laws; property values diminished by fluctuating currencies and subjected to discriminatory legislation; and society itself threatened by civil violence and insurrection.

There is no room for doubt that politically the Articles of Confederation were a failure. The view, however, that social and economic chaos and catastrophe prevailed during the period is actually an ex parte presentation of the situation. Historians have too often either not realized or have glossed over the fact that "most of the interpretations or evaluations of the Articles were made by nationalists seeking to point out defects and aiming to secure either radical revisions or replacement of the form of government thereby established."[13] A recent study

[13]Haines, The Role of the Supreme Court in American Government and Politics 1789-1835, p. 84 (1944). It has been stated that "the chief sources of information bearing on the thesis are the assertions and lamentations of but one faction in the great dispute and they must, therefore, be approached with the same spirit of prudence as Whig editorials on Andrew Jackson or Republican essays on Woodrow Wilson." Beard and Beard, 1 The Rise of American Civilization, p.302 (1927).

of the Confederation period[14] presents quite a different picture of a new nation fairly bursting with energetic activity and making progress in many directions. Emphasis is placed on many social and economic facts not usually found in the traditional literature on the period. Thus, the rapid increase in population, due to a large birth rate and a renewal of immigration after the war, brought about a growth in towns and cities and stimulated the migration which pushed settlements ever farther west. The new state constitutions encouraged a far wider and more democratic participation in government than ever obtained before. The church was disestablished. Entail and primogeniture were abolished. Criminal codes and prison conditions were improved. The distribution of great loyalist estates confiscated during the revolution resulted in a democratization of land ownership. Companies were organized to build roads, canals and bridges. Newspapers and magazines were commenced. Medical, social and humanitarian societies were formed. Banks were founded. Artisans became small manufacturers with the result that more and more goods were produced domestically. The British legal restrictions on American shipping were widely ignored, and trade with France, Holland, and the Orient expanded so that shipping tonnages increased everywhere throughout the states. The discriminatory trade laws between states were actually few, and reciprocity and trade between states was the rule rather than the exception. Agricultural production increased, but many farmers suffered due to the scarcity of specie and the perennial farmer's predicament of selling in a buyer's market and buying in a seller's. Boundary disputes between states were settled amicably, and by 1787 all states but Virginia had repealed those laws which conflicted with the treaty of 1783.

The impression received from such an analysis certainly is not the traditional one of a "critical period" of social chaos and economic stagnation. On the contrary, it is a picture of what must have seemed, from the radical point of view, to be an evolution of the good society. But this more favorable appraisal of economic and social conditions does not gainsay the basic criticism of the conservatives—that politically the central government was woefully weak to the point of virtual impotence. From the conservative point of view, the lack of a strong central authority independent of and superior to the states was the great flaw and inadequacy of the Articles, and this is what they were out to change. They went about accomplishing their nationalist desires like the able politicians that they were, by organizing and maintaining a steady and unremitting campaign throughout the states, a campaign in which they emphasized the ills of the times, actual and imagined, and attributed them directly to a faulty political system. It is a fact, and

[14]Jensen, The New Nation (1950).

not an accidental one, that by far the greater part of the published writings of the Confederation period emanated from conservatives and their spokesman lawyers and newspapers. The success of their campaign is demonstrated by the fact that their ex parte writings, an inseparable blend of factual reporting and political propaganda, were widely accepted by succeeding generations of Americans as good and true history.

THE NATIONAL SOVEREIGNTY ARGUMENT

The political system created by the Articles has been described as a compact of independent and sovereign states. In all fairness, it should be noted that this description has not been unanimously accepted by constitutional historians. As mentioned previously, a debate over the nature of the government during the Confederation period began almost immediately after the adoption of the Constitution, and has been going on ever since. Since that time, and including the present day, many historians have taken the position that national sovereignty had existed since independence was declared and have denied that the states were ever sovereign in the period prior to the Constitution. It is therefore necessary to examine the case for the existence and exercise of national sovereignty during this period. First, emphasis is placed on the fact that, prior to the adoption of the Articles, the Continental Congress exercised national functions for national purposes. The strongest case for the existence of a clearly recognized and exercised national sovereignty is therefore found in the fields of war, peace, and foreign relations. And in support of this position there is called an unexpected witness.

Even before the adoption of the Articles, which expressly authorized the practice, Congress had created a procedure for hearing appeals from the states in cases of captures and prizes. In one such instance the decision of a Pennsylvania court of admiralty was reversed by the Congressional Commissioners of Appeal. Pennsylvania refused to execute the award of the Commissioners on the ground that the state law was supreme. To consider the matter, Congress appointed a committee of which Thomas Burke was the chairman. The report of Burke's committee asserted that disputes concerning captures "must be determined by the law of nations," that "the power of executing the law of nations is essential to the sovereign supreme power of war and peace," that Congress "is by these United States invested with the supreme sovereign power of war and peace," and that the right of appeal to Congress in prize cases could not be destroyed by the "act of any one state."[15] This report was adopted unanimously by all the

[15]This was the Olmstead case which later became a cause celebre after the adoption of the Constitution.

states except Pennsylvania. Thus did the champion of state sovereignty recognize the existence of a national sovereignty. How can this be reconciled with Burke's sponsorship of Article II of the Confederation? The answer suggested is that, although Burke certainly intended to retain the bulk of governmental power for the states and to deny any extension by implication of powers expressly granted to Congress, he nevertheless recognized that certain powers were national in their nature and that, as to these, sovereignty rested not with the states but with the Congress. Even before this incident occurred, Burke had written to his governor that "it was the proper policy of America to maintain that the American states stand in no other relation to Britain than as an independent empire at War with her."

Burke's view later received judicial recognition. The case of *Penhallow v. Doane*,[16] decided by the Supreme Court in 1795, raised the same question dealt with by Burke's committee. A Congressional Commission of Appeal had reversed a prize decision of a New Hampshire admiralty court. New Hampshire argued that on casting off allegiance to the crown, the colonies had become distinct, independent states, that Congress was a convention of ambassadors from sovereign states, and it was denied that Congress had the exclusive power of war. The Court was unanimous in upholding Congressional authority. Under the custom of that time, each of the four justices who decided the case delivered a separate opinion which recognized the supremacy of Congress in the field of foreign relations. In discussing the situation prior to the ratification of the Articles, Justice Patterson stated:

> "The powers of Congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme, and controlling council of the nation, the center of union, the center of force, and the scn of the political system. To determine what their powers were we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government. Congress conducted all military operations both by land and sea. Congress emitted bills of credit, received and sent ambassadors, and made treaties. Congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America. In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the

[16] 3 Dallas 54 (1795).

question of prize. If it be asked, by whom, during our revolution war, was lodged, and by whom was exercised this supreme authority, no one will hesitate for an answer. It was lodged in, and exercised by Congress; it was there, or nowhere; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war. For, in such case, there would have been as many supreme wills as there were states, and as many wars as there were wills. Happily, however, for America, this was not the case, there was but one war, and one sovereign will to conduct it. The danger being imminent, and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert, or break, the violence of the gathering storm; they accordingly grew into union, and formed one great political body, of which Congress was the directing principle and soul. As to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount, and supreme. The truth is, that the states, individually, were not known nor recognized as sovereign by foreign nations, nor are they now; the states collectively, under Congress, as the connecting point, or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors."[17]

The next year—1796—Justice Chase expressed his view on the matter in the case of *Ware v. Hylton*.[18] Referring to the Declaration of Independence, Chase stated:

"I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states; etc., but that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth . . . . From the 4th of July, 1776, the American states were de facto as well as de jure, in the possession and actual exercise of all the rights of independent governments . . . all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments."[19]

But this apparently unequivocal assertion was later in his opinion substantially qualified.

"It has been enquired what powers Congress possessed from the first meeting, in September, 1774, until the ratification of the articles of confederation, on the 1st of March, 1781? It appears to me, that the powers of Congress, during that whole period, were derived from the people they represented, expressly given, through the medium of their state conventions, or state Legislatures; or

[17]Supra at 80-81.
[18]3Dallas 199 (1796).
[19]Supra at 225.

> that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. After the confederacy was completed, the powers of Congress rested on the authority of the state legislatures, and the implied ratifications of the people; and was a government over governments. The powers of Congress originated from necessity, and arose out of and were only limited by, events; or, in other words, they were revolutionary in their very nature. Their extent depended on the exigencies and necessities of public affairs. It was absolutely and indispensably necessary that Congress should possess the power of conducting the war against Great Britain, and therefore if not expressly given by all, (as it was by some of the states) I do not hesitate to say, that Congress did rightfully possess such power. I entertain this general idea, that the several states retained all internal sovereignty; and that Congress properly possessed the great rights of external sovereignty."[20]

Each of the justices in these two cases based his opinion that Congress possessed an external sovereignty over foreign affairs on a finding that there was either an implied or an express grant of the power to Congress by the states, or an acquiescence in the exercise of such power, arising out of the necessity for united action against the common enemy. These opinions are therefore rather pale authorities compared with the 1936 opinion of Justice Sutherland for the Supreme Court in the case of *United States v. Curtiss-Wright Export Corporation*.[21] Sutherland's statement in this case is especially interesting in view of the fact that in other contexts he was quite ready to find that state power was a limitation on national authority. After stating that the powers of the federal government in internal or domestic affairs were different in origin and nature from its powers in foreign or external affairs, Sutherland said that in the domestic field:

> ". . . the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, the Representatives of the United States of America declared the United (not the several) Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, establish Commerce and to do all other Acts and Things which Independent States may of right do'. As a result of the separation

[20]Supra at 231.
[21]299 U. S. 304 (1936).

> from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it passed immedately to the Union.[22]

But not only in the external area of foreign affairs has it been argued that a national sovereignty existed prior to the Constitution. It is pointed out that Article I of the Articles recognized the existence of a political body entitled "The United States of America." To the Congress created by the Articles was granted by that document certain "sole and exclusive" powers, many of which dealt with matters of internal and domestic concern. The Articles also laid express prohibitions upon the states to prevent their interference with the Congress in the area of its delegated powers. It is maintained, therefore, that the Articles clearly recognized a national authority which was to have national sovereignty over certain matters of national concern.

There is also the matter of the Western lands. By their royal charters, many of the colonies were entitled to lands west of the Appalachians. When independence was declared, title claims were asserted by the states. As we have seen, the states which did not have land claims advanced the theory that sovereignty over the Western territory had devolved from the Parliament to the Congress, but the language in the Dickinson draft providing for Congressional power over such lands was scrapped in favor of a proviso recognizing state sovereignty. The landless states were dissatisfied and felt that the Western lands should be surrendered to the central government, and Maryland delayed the adoption of the Articles until 1781 for this very reason. Between 1781 and 1786 most of the landed states successively ceded their western claims to Congress, which body thus became possessed of millions and millions of acres in the name of "The United States of America." To provide for the government of this territory and its eventual organization into states, Congress enacted in 1787 the Northwest Ordinance. These events subsequent to the adoption of the Articles, it is maintained, constitute tangible evidence of a national

[22]Supra at 316-17.

unity recognized by all of the states and the exercise of a national sovereignty over nationally owned territory.

Finally, there is also adduced in support of national existence and national sovereignty the writings and utterances of the leaders of the period, radicals as well as conservatives. The language of the time was replete with words and phrases which recognized the United States as a free, sovereign, independent nation. Not only in diplomatic correspondence and treaties, but also in personal correspondence and writing from 1776 on, there is found much language which describes the United States in terms of independent and sovereign nationhood.[23]

That Americans in later years, and even today, have been unable to agree as to the essential nature of the government which existed prior to the Constitution is not so surprising when it is remembered that the political leaders themselves during and after the Revolution were in fundamental dispute as to what its nature was or ought to be. But the disagreement has another and more revealing explanation. Adherents of conflicting positions have examined the history of the period between 1776-1789 in search of evidence to support their own particular interpretation of the Constitution which replaced the Articles. In so doing both sides have operated under a logical fallacy. The nationalists thought they had to disprove state sovereignty before the Constitution in order to disprove it after the Constitution. And the states righters thought that they could prove state sovereignty under the Constitution by proving it before the Constitution. Since all historical research and writing requires both the selection and the interpretation of facts, it should come as no surprise that each side was able to "prove" its case by historical evidence.

A prime example of the equivocal use of the facts of history occurred in the Constitutional Convention in a debate over the effect of the Declaration of Independence. In its opening sentence the Declaration referred to "one people" assuming "among the powers of the earth" a "separate and equal station." In the last paragraph the Declaration stated that "these united colonies are, and of right ought to be, free and independent states." In the Convention, Luther Martin and James Wilson clashed over what the true effect of the Declaration was. To Martin it was clear that the separation from Great Britain "placed the thirteen states in a state of nature toward each other," that "the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one." Wilson, on the other hand, "could not admit the doctrine that

[23]See Brant, James Madison: Virginia Revolutionist (1941). Chapter XVIII, "E Pluribus", is an excellent discussion of the question from the national sovereignty point of view. The appendix, "American Nationhood During the Revolution", is a collection of quotations from contemporary writings.

when the colonies became independent of Great Britain, they became independent also of each other. He read the Declaration of Independence, observing thereon that the United Colonies were declared to be free and independent states; and inferring that they were independent, not individually but unitedly."

CONCLUSION

In the context of such sustained historical disagreement, one can only state his own view without any hope of settling the question. It should be clear that, in the opinion of the present writer, the period under discussion was one in which state sovereignty prevailed. But since there is no single definition or concept of "sovereignty" which is universally accepted, an additional word of explanation should be offered of the sense in which the term is used here. When it is said that the states were sovereign prior to the adoption of the Constitution, what is meant is that there was no superior coercive authority, either in law or in fact, to which the states were required to yield. Certainly it is true that the states were incompetent separately to accomplish many of the purposes which the times and the needs and the people demanded; for the realization of certain objectives centralized, coordinated and unified action was essential. It is also true that the central government was authorized to exercise, and did exercise, national power for national purposes. But when these things are admitted, certain irrefutable practical facts remain. The central government had no national existence or authority independent of its creators. It was the subservient creature of the states, operating through them rather than directly on the people. It had only narrow powers resulting from express grant, with no room for powers by implication, but even within the area of express power, it had no coercive power of enforcement against the states. Both before and during the Articles of Confederation, central authority existed and was exercised just so far as the states were willing to recognize and accept it, and no farther. It is doubtless true that, in the consciousness of many people, there was an American nationality. But there was no national government, there was only a central common agency. In the final analysis, the states were de jure and de facto supreme. For this reason, it is believed that, so far as the system of government before the Constitution may be described in words, it is most accurately referred to as a compact between sovereign states.

The Articles of Confederation, short-lived though they were, nevertheless constituted a necessary transitional step between the Declaration of Independence and the adoption of the Constitution. In 1776 the American people revolted against a foreign government which

exercised strong central authority. At that time they were simply unwilling to replace it with another strong central government, even of domestic origin. Thus the fate of the Dickinson draft, and the triumph of Thomas Burke. But the victory of 1777 for the forces of state sovereignty was destined to be only a temporary one. It lasted, as a matter of fact, for only ten years and ironically, the very principle for which Burke fought proved in practice to contain the seed of its own destruction. For the practical consequences of state sovereignty during the revolution were almost disastrous to the cause of independence. And once independence was achieved, the Articles of Confederation offered convincing evidence that a system based on state sovereignty was inadequate to the needs and aspirations of the American people.

The "chaos and catastrophe" version of the confederation period is today largely discredited; socially and economically the people moved ahead. The failure of the confederation period was of a political nature. If the function of a political system is to promote and facilitate the progress and happiness of the people who live under it, then by this standard, the Articles were a failure, and more importantly, they were a failure from a nationalist point of view. By 1787, even radical leaders recognized and admitted that there were national problems which demanded national solutions and that the central government needed more power. This might have been accomplished, however, by amending the Articles to confer the necessary power upon Congress. That events did not unfold in this manner is attributable to the existence of a cohesive group of nationalist leaders—men of rare intelligence and ability—who knew what they wanted and moved with great political skill to achieve it.

Defeated in the drafting of the Articles, the nationalists immediately upon their adoption sought to strengthen the central government, first by construction and then by amendment. But while they wanted additional power for Congress so long as the Articles were in effect, the nationalists never accepted the Articles and the type government created by them as permanent institutions for the United States. The Articles provided for a confederation type government in which the central authority was the creature of the states, acting through the states, and hence, in final analysis, no matter how many additional powers it might be granted, subordinate to the states. What the nationalists wanted was a central government independent of the states, paramount to the states both in law and in fact, and with coercive power over states and individuals. Like the radicals in 1776, the nationalists ten years later shrewdly and boldly seized the historic opportunity afforded by a climate of opinion favorable to political change.

It is thus seen that the two dominant facts of the period from

1776-1789 were the failure of a political system based on state sovereignty and the existence of an able nationalist leadership to capitalize on that failure. The result of the conjunction of these two facts was that the Articles of Confederation, instead of being amended, were completely abandoned. They were replaced by a new and fundamentally different document, the Constitution of the United States, in the creation of which the nationalists in large measure realized their desires, and in the process assured themselves immortal roles as Founding Fathers.

FORESEEABILITY IN THE LAW OF NEGLIGENCE

*George W. Rogers, Jr.**

The field of jurisprudence dealing with negligence has become in many respects the most important aspect of the common law as it touches men in all walks of life today. Every time anyone takes the wheel of an automobile he faces the possibility of being involved in a lawsuit, the outcome of which will depend upon the law of negligence. Yet the principles of the law of negligence are necessarily the most difficult to formulate with any degree of exactitude; and, when formulated, virtually impossible to apply with any degree of certainty. This is necessarily so. The law of negligence is inextricably intertwined with concepts of social policy and morality. It deals with the question of who is to bear the loss or injury to person or property, the innocent person who suffers the injury or the wrongful actor who put the forces in motion which cause the injury. The definition of what acts are wrongful or negligent and of who is to be considered innocent involve moral judgement which will vary with the generally accepted moral standards of the community. The extent to which a chain of causation will be followed and an act will be considered the proximate or legal cause of an injury involves questions of social policy which will vary with the conditions of social organization. However, even though we admit the necessity for a certain degree of vagueness and inexactitude arising from the above considerations, there is no need to introduce any further element which may lead to doubt or confusion. At least the statements of principle within which these variables must operate can be logically and consistently set forth. Unless this is done, the suspicion of chance, caprice or whim playing a large part in the operation of the law of negligence will certainly be magnified in the public eye, and perhaps not unjustifiably so.

There are some basic statements concerning the law of negligence with which all authorities are in agreement. These have been set forth in the lucid and logical prose of Judge Griffith as follows:

> "The rule is firmly established in this state, as in nearly all the common law states, that in order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such character, and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom. *D'Antoni v. Albritton,* 156 Miss. 758, 766, 126 So. 836; *Williams v. Lumpkin,* 169 Miss. 146, 152, 152 So. 842; but that the actor is not bound to a prevision

*Teller & Biedenharn, Attorneys-at-Law, Vicksburg, Mississippi

> or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of possibilities."[1]

An analysis of the basic approach followed in all negligence actions likewise shows that the annotator writing in 155 A. L. R., page 157, is fundamentally correct when he says:

> "Negligence in the abstract, distinct from its consequences and disassociated from its actual invasion of the rights of some particular person, is a very shadowy and elusive concept. Yet, as a practical matter, it is necessary to observe such a distinction, because the courts, in determining legal responsibility, divide the inquiry into two steps: First, was the defendant guilty of negligence; second, if so, was that negligence the 'proximate cause' of the plaintiff's injury?"

Nevertheless, courts, in grappling with the problem of applying the general principles of the law of negligence to specific factual situations have often failed to make this logical distinction. This has led to the application of legal principles, perfectly sound within their sphere, in a manner which has created inconsistency in the law.

The common law liability for negligence rests on a basis of moral guilt attributable to the one to be held liable. But if there is to be any moral guilt involved in an action then the actor must either realize or be in such circumstances that he ought to realize that such action is liable to cause injury to someone. Therefore, foreseeability is an indispensable element of negligence. However, it is submitted that as an element it should be confined chiefly to the first step of the inquiry as set forth above: Was the defendant guilty of negligence? When so confined we need only ask, in the language of Judge Griffith, should the defendant "reasonably have anticipated that *some* injury to *another* will probably result therefrom?" (emphasis added). If we answer this inquiry in the affirmative, then we may go on to the next step and ask whether or not the negligent act was the proximate cause of the injury. To this phase of the inquiry different principles are to be applied and the element of foreseeability should not play the same important role.

It is only in this way that the principle that a man should not be held responsible for that which is unusual and unlikely to happen can be reconciled with the principle that it is not necessary to impose liability that the particular injury or the particular manner in which the injury complained of was incurred should have been foreseen.

However, it seems clear that Judge Griffith, in writing the opinion in the cause of *Mauney v. Gulf Refining Co.*[2] failed to make this logical distinction. There, in his inimitable style, he wrote:

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[1]Mauney v. Gulf Refining Co., 193 Miss. 421, 90 So.2d 780 (1942).
[2]See note 1 supra.

> "The settled law in this state may be summarized in the form of a diagram, as follows: The area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameters of the circle, and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which, although foreseeable, were foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle,—in all of which time, place and circumstance play their respective and important parts."

It is apparent from the opinion that Judge Griffith was denying liability because the particular manner in which the particular injury was incurred could not have been foreseen and not that it was not foreseeable that *some* injury would probably result from the act complained of.[3]

It is submitted that at the time Judge Griffith wrote this opinion such was not the "settled law in this state," that it has not become the settled law since, and should not be allowed to become the settled law.

It certainly was not the settled law at the time. In the case of *Cumberland Telephone Co. v. Woodham,* the court had stated.[4]

> "Without attempting to define proximate cause in such terms as will be applicable to all states of fact—for to do so is practically impossible—it will be sufficient to say that the negligent act of a person, resulting in injury, is the proximate cause thereof, and creates liability therefor, when the act is of such character that, by the usual course of events, some injury, not necessarily the particular injury, or injury received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to have anticipated that some injury would probably result from the act done."

This holding had been reaffirmed many times, and was quoted with approval in the case of *Brewer v. Town of Lucedale.*[5] In that case the plaintiff was a W. P. A. worker engaged in filling holes at an intersection of two of the main streets of Lucedale. A car approached from one direction at a slow speed and the plaintiff moved aside to avoid the danger, but a car coming from another direction ran into the first vehicle and caused it to veer in the very direction in which plaintiff was retreating. At the edge of the street intersection where all this activity was transpiring there was a concrete catch basin put there and

[3]The circumstances of the case were that an explosion occurred in the course of filling a gasoline tank at a station from a tank truck. Of course it is foreseeable to anyone that some injury will probably be sustained by someone if such a hazardous action is done in a negligent manner.

[4]99 Miss. 318, 54 So. 890, 891 (1911).

[5]189 Miss. 374, 198 So. 42 (1940).

maintained by the Town of Lucedale which was 18 inches deep, 2 1-2 feet long and 2 feet wide. The plaintiff testified that, as the car approached him at the rate of four miles per hour:

> "I threw out my hand, and it struck my arm, . . . and I staggered back, and walking back and running backwards, and I fell into the hole that was there . . . . When I fell that way in the hole, I felt my leg break as it struck the far edge of the concrete of the hole, and I went to rolling over there, and I must have rolled over about four times, every time I would turn over and the car was right at me, and the car stopped, and I was stopped too."[6]

It was certainly a reasonable probability that someone might be injured by the concrete catch basin that was in the streets of Lucedale. However, it is doubtful that anyone could have previsioned the injury which befell the unfortunate Mr. Brewer. If the test of Judge Griffith had been applied, Mr. Brewer would have been out of court before he got in. A reasonable person could have looked down every semi-diameter available and never have foreseen the plight of Mr. Brewer. Yet, Mr. Brewer was allowed to take his case to the jury.

The holding in the *Mauney* case has not yet become the settled law of this state. In a subsequent case, Judge Alexander, speaking for a majority of the court, said:

> "If appellant's conduct threatened some reasonably foreseeable harm to appellee, then it was negligent toward him, and appellant would be liable for any damage proximately resulting to appellee even though the manner in which the damage was made a reality was not actually and definitely foreseeable. *It is no defense that the liability is seen to extend beyond the risk.* Prosser, Torts, page 183."[7]

It is respectfully submitted that the "semi-diameters" rule of Judge Griffith should not be allowed to become the settled law in this state. The distinctions which are drawn here are not a mere play on words. It can be determinative of whether or not a great number of the injuries which will befall citizens of this state will find redress at the hands of the law. It has been frequently commented upon in judicial opinions that in dealing with accidents the bizarre is not at all unusual.

Since the decision in the *Mauney* case there has been at least one instance in which a plaintiff has been turned away without redress, apparently because his case involved a bizarre and unusual sequence of events. This case is that of *Sturdivant v. Crosby Lumber & Manufacturing Co.*,[8] in which a demurrer to the declaration was sustained. The facts as alleged were that the defendant maintained at its mill high voltage electric lines which were negligently equipped with old, rotten and ragged insulation; that because of this condition the wires were

[6] 198 So. at 43.
[7] Billups Petroleum Co. v. Entrekin, 209 Miss. 302, 46 So.2d 781 (1950).
[8] 218 Miss. 91, 65 So.2d 291 (1953).

highly attractive to lightning, but that the defendant negligently failed to equip this electrical system with lightning arresters or grounds; and that on several occasions lightning had struck the wires causing damage to the switches, motors and machinery of defendant. The plaintiff's husband worked at defendant's mill and during the noon hour was sitting under a tree near the electrical wires when a bolt of lightning struck the wires. The declaration then charged:

> ". . . and the said bolt of lightning and the tremendously excessive overload of electrical current resulting therefrom traveled down and along the said overhead power line leading southwardly as hereinabove shown along the easterly side of the planner mill or pump house and, because of the said tremendously excessive overload of current and because of the negligent failure of the defendant to provide the said wires making up the said overhead distribution system with sound, unbroken and adequately maintained insulating materials along the full length of said wires or to provide the said wires and electric distribution system with lightning arresters or other precautionary installations, the excess of electrical current, above the normal load capacity of the said wires, arced, from the point at which the said power line made its right angle turn into the planner mill and pump house, to the said tree under which the plaintiff's decendent was resting; that said electrical charge traveled down the said tree and a vine suspended therefrom into the body of the plaintiff's decendent causing the death."

It is suggested that a demurrer to the declaration should not have been sustained, at least upon the ground upon which the court based its decision. Assuming the fact that the wires were improperly insulated caused them to be attractive to lightning, assuming that lightning arresters and grounds would have materially reduced the hazard (and these are certainly questions of fact admitted on demurrer), then it would be for the jury to decide whether a reasonable and prudent person in the circumstances of a mill owner should have taken such protective measures. If they should so decide, then there was negligence.

The inquiry should then be directed to the question of whether or not the negligence proximately caused or contributed to the injury complained of, in which inquiry the element of foreseeability should not be considered. The court, in its opinion, implies that if the decendent had been working on or near the machinery which had been previously damaged by lightning induced electricity and had been killed, then a cause of action would have been stated.[9] Why should a defendant whose acts would give rise to liability if the injury occurred in a

[9]The court stated the following: "For purposes of deciding this case on demurrer, we must assume the averments in the declaration are true. That being so, the declaration adequately charged that appellee was negligent in failing to keep its overhead wires in good condition with reasonable insulation on them and in failing to have lightning arresters and grounds on the wiring system. The pertinent rule is stated in 18 Am. Jur., Electricity, Sec. 91, pp. 483-484: 'According to the great weight of authority, if by the exercise of such reasonable precautions as a

manner which might easily be foreseen, be freed from liability for those selfsame acts just because the injury happened in an unusual manner? Yet, Judge Ethridge, speaking for the court in the *Sturdivant* case, says:[10]

> "We cannot look from effect to cause. The standard is an external one, from the point of view of the actor prior to the occurrence."

And here he is not speaking of whether or not an act is negligent, but whether or not the negligence, which has been established, is the proximate cause of the injury.

If the ruling in the *Sturdivant* case had been followed in the case of *United Novelty Co. v. Daniels*[11], the latter case would certainly have been decided differently. The majority opinion in the case of *Billups Petroleum Co. v. Entrekin*[12] describes the former case as follows:

> "It is rare indeed that such an unusual chain of circumstances could be forged to join cause and effect as was present in *United Novelty Co. Inc. v. Daniels,* Miss., 42 So. 2d 395. Here, a rat, evicted from a coin-operated machine, sped beneath an open gas burner where its fur, impregnated with gasoline fumes, became ignited. It scurried back to its former refuge thereby igniting the fumes therein. The resultant explosion killed a servant employed in cleaning the machine under these conditions. Here again the initial inquiry was whether reasonable care had been exercised to make the place of work reasonably safe. The original negligence bore fruitage through an unforeseeable diagram of events. The gist of the action was the unreasonable exposure of the servant to a foreseeable risk of some harm. This was enough."

The inevitable inconsistency involved in the two lines of decisions discussed herein has not been faced by the court. In the most recent decision involving this question our court apparently followed the line of decisions which hold that it is only necessary that some injury, not necessarily the particular injury complained of, be foreseeable. However, in the same opinion it is stated:

> "And, in order to establish that a negligent act or omission was the proximate cause of an injury, it must be shown that the injury was foreseen, or that it reasonably should have been foreseen, as the natural and probable result of the negligence."[13]

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man of ordinary care and prudence would exercise in respect of such a dangerous agency, injuries to persons and property from the conduction along the wires of currents of atmospheric electricity may be avoided, or at least minimized, it is the duty of companies engaged in this business to employ devices and appliances to that end and a failure to do so will render them liable for injuries resulting therefrom. Thus, the company is liable for fires resulting from lightning carried over the wires and into buildings as a consequence of its failure to supply the necessary safeguards; . . .' Moreover we think that whether Sturdivant was at the specific time of his death an employee or an invitee, appellee owed him a duty to use reasonable care to protect him from injury."

[10] 65 So.2d at 295.

[11] 42 So.2d 395 (Miss. 1949).

[12] 209 Miss. 302, 46 So.2d 781 (1950).

[13] Scoggins v. Vicksburg Hospital, 91 So.2d 837 (Miss. 1957).

It is the opinion of the writer that the court should come to grips with this dichotomy of authority and that the element of foreseeability should be eliminated from the question of proximate cause. The court long ago adopted the language of Section 435 of the *Restatement of the Law of Torts* which states:[14]

> "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

This principle should be reaffirmed and the holdings in such cases as *Mauney v. Gulf Refining Co.*[15] and *Sturdivant v. Crosby Lumber & Manufacturing Co.*[16] should be distinguished or overruled. The elements of foreseeability should be relegated, for once and for all, to its proper sphere as was done by the Supreme Court of Wisconsin when it stated that "foreseeability . . . applies only to the question of negligence . . . and not to limit the liability for consequences of the wrongful act", and that "the fact that the natural consefuences (of negligence) cannot be forseen does not operate to limit liability."[17]

Of course some limit must be placed on liability for the consequences of a wrongful act. Effect follows cause and in turn becomes a cause producing its own effect in an unbroken chain; each link of which combines with different lines of cause and effect until the force of the original cause with which we start becomes indistinguishably merged in the interaction of all human events.

But this limitation can be invoked within the definition of proximate cause as laid down by the court without the intrusion of the element of foreseeability. Our court has stated:[18]

> "Of course, the negligence of the defendant must be the proximate cause of the injury. *Hinds v. Moore,* 124 Miss. 500, 87 So. 1. If the defendant's negligence is a substantial factor in causing harm to another, then that action is negligent on the part of the actor. If reasonable men have a difference of opinion as to whether or not the negligence of the actor continued as a substantial factor in bringing about the injury, then the question is for the jury."

In cases where the injury is only tenuously connected with the negligent act, liability can and should be denied on the basis that such negligence could not be a substantial factor in causing such injury. Indeed, if the same result had been reached in the *Mauney* case and such result had been predicated upon his ground, little cause for criticism could be found.

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[14]Magers v. Okolona, Houston & Calhoun City R. Co., 174 Miss. 860, 165 So. 416 (1936).

[15]Note 1 supra.

[16]Note 8 supra.

[17]Osborne v. Montgomery, 203 Wis. 223, 234 N. W. 901 (1931).

[18]Note 14 supra.

NEGLECTED CHILDREN IN MISSISSIPPI

*Nathan Levy, Jr.**

INTRODUCTION

The neglected child is a problem in Mississippi just as he is everywhere else. It would be a mistake, however, to plunge into an analysis of this problem without at least a few basic social and economic facts about the state, and without some consideration of the judicial and administrative format which attempts to handle this problem. Without this knowledge it is quite easy to slip into the fallacious practice of judging distant events in the light of one's own environment rather than the environment where the events happened. The following introductory matter is included in order to put the events in their own context.

Mississippi is predominantly an agricultural region whose farms are punctuated by villages and small towns. It has only recently begun to devolp industrially. Of a total population of nearly 2,200,000 72 per cent live in rural areas, as compared with 36 per cent for the entire United States. Only North Dakota has a greater percentage of its population in rural areas.[1] Less than 5 per cent of Mississippi's people are engaged in manufacturing enterprises.[2]

The state is roughly 330 miles long from north to south and 180 miles wide, giving it a population density of 46 persons per square mile. In 1950 the largest city, the state capital, Jackson, had a population of 98,000. Two other towns had populations of about 40,000, and six had 20,000 to 30,000. The situation is not greatly different today. It has the highest percentage Negro population, 45 per cent, and one of the lowest percentage white foreign-born, 0.4 per cent, of any state. Only 0.2 per cent of its people are other than Negro or white. In a growing America, its population has remained virtually constant for the past 25 years, and in fact declined slightly between 1940 and 1950, due at least partially to the emigration of many Negroes and some whites seeking better economic conditions.[3]

Its annual per-capita income of $946 in 1955 was the lowest in

*Associate Professor of Law, University of Connecticut School of Law, (formerly, Attorney-at-Law, Vicksburg, Mississippi).

[1]According to the Census of 1950. A rough paraphrase of the definition of "urban" adopted by that census is, any community, incorporated or unincorporated, with 2,500 or more inhabitants. U. S. Department of Commerce, Statistical Abstract of the United States 2, 22 (1957). For an interesting discussion of the growth and development of municipalities in Mississippi, see Fortenberry, "Municipal Government in Mississippi", 29 Miss. L.J. 58 (1957).

[2]U. S. Department of Commerce, Statistical Abstract of the United States 206.

[3]Id. at 8, 13, 16-20, 30, 34, 158.

the nation, being half the national average. A century of one-crop cotton farming and soil erosion have depleted much of its farm wealth. Its farmers rely upon substantial subsidies from the Federal Government. Lacking the capital to exploit what resources it has, including oil and gas, many of its larger industries are owned by outside capital.

This article is primarily concerned with selected civil judicial aspects of the problem of neglected children, and intends to develop the background of trial and error which has culminated in our present Youth Court and to show how it functions in neglect cases. This is not to deny the importance of either (1) criminal proceedings for desertion or abandonment of children, (2) administrative agencies which deal with our problem, or (3) the closely related problem of juvenile delinquency. Each is worthy of separate and detailed treatment. Accordingly, the first category is not considered herein and rather cursory attention is given to the latter two as aids in understanding the principal subject. For the same reason, there will be no consideration of such allied matters as the effect of neglect of children in custody determinations arising in divorce or habeas corpus proceedings, or in determining whether a parent is unfit and therefore lacks the power to bar adoption of his child by objection thereto.

THE DEVELOPMENT OF MISSISSIPPI'S CHILD WELFARE PROGRAM

Mississippi became a state in 1817. Between 1798 and 1817, it and what is now the state of Alabama comprised the Mississippi Territory, whose population in 1799 was about 5,000.[4] Among the very first of the laws promulgated by the territorial government in 1799 was an act[5] providing for the appointment of "overseers of the poor" in each county, with duties to:

> " . . . take notice of all the poor and distressed families, and persons residing in his proper township; and enquire into the means by which they are supported, and maintained. And whenever he shall discover any person, or family, really suffering through poverty, sickness, accident or any misfortune, or inability, which may render him, her or them, a wretched and proper object of public charity; it shall be his duty, and he is hereby strictly enjoined, to give immediate information thereof, to a justice of the peace, acting in and for the same county, that legal means may be taken by such justice, to afford the person or persons so suffering, proper and seasonable relief . . . ."

Sargent's Code does not specify just how the "proper and seasonable relief" is to be administered.

[4]Sargent's Code Introduction, p. i (The Historical Records Survey, Division of Professional and Service Projects, Works Progress Administration 1939).

[5]Id. at 72.

A few months later the involuntary apprenticing of "orphan children who are chargeable to the county, or likely to become so" was made the responsibility of the "overseers of the poor."[6] They were required:

> ". . . to apply to the Court of Quarter sessions, held for the county, in which such poor children reside, to grant an order for such overseers, to bind the children as apprentices, to any reputable and discreet person, who may be willing to take them: the male children until they arrive at the age of twenty one years, and the female children until they arrive at the age of eighteen years . . . ."

The master of the apprentice was required:

> ". . . to provide the apprentice with a sufficiency of good and wholesome provisions, necessary cloathing, washing and lodging, teach the said apprentice the business or occupation, which he pursues for a livelihood, and also to read, write, and cypher as far as the rule of three; and at the expiration of the apprenticeship, to furnish the said apprentice with one complete new suit of cloathing, and two shirts; if a female, one complete new suit of cloaths and two shirts."

The court had authority to revoke the apprenticeship upon proven complaint against the master or mistress.

By 1807 a representative territorial legislature enacted a fairly comprehensive "Act for the Relief and Settlement of the Poor."[7] This enlargement of the scheme of Sargent's Code provided for the systematic handling of relief rolls by the "overseers of the poor" and for the payment of expenses out of the county treasury.

The most important innovation in 1807, from the standpoint of this article, was the extension of the apprenticeship institution to include, not only orphans, but also such children within the overseers' districts "whose parents they shall judge incapable of supporting them, and bringing them up in honest ways," and "on any criminal prosecution," the children of the "prisoner" when "it shall appear to the satisfaction of the court, that there can be no reasonable expectation that the family of the prisoner will be brought up in honest courses," and that fact was certified to the overseer.[8] These provisions were probably not intended as a basis for the binding out of children who were neglected in ways other than economic, for the tenor of the legislation of that day is to provide either tangible assistance or the education to enable the child to support himself.

It was also provided that the "father and grandfather, the mother and grandmother, and the descendants of poor, old, blind, lame, and impotent person, or other person not able to work, being of sufficient

[6]Id. at 124.
[7]Miss. Code c. XIV, art. 2 (1848).
[8]Id. c. XIV, art. 3.

ability, shall, at their own charge, relieve and maintain every such poor person, as the justices shall direct at their next county court, in their respective counties, or the corporation courts in their respective towns, on pain of forfeiting eight dollars for each month they shall fail therein."[9]

Between 1807 and 1857 the "Poor" legislation continued to grow steadily. Poor-houses, charity hospitals and insane asylums were established. Involuntary apprenticeships for "Free Negro and Mulatto Children" were established in 1829 (with provisions for humane treatment and the teaching of an occupation, but without requirements for the teaching of reading and counting).[10] The whole institution of apprenticeship was further refined and regulated under the general supervision of the courts.

In 1857 the relief of the poor and the adjudication of apprenticeships was removed from immediate judicial control and placed under the Boards of Supervisors (at that time called "Boards of Police") of the several counties.[11] These elected bodies constitute the limited "legislatures" of the counties, and also supervise many county administrative functions. In 1871 "overseers of the poor" became "supervisors of the poor,"[12] but the functioning of the office remained essentially the same from 1799 until 1880 when that office was no longer provided for by the code. Most of the former duties of the overseers of the poor were then assumed by the individual members of the Boards of Supervisors in their respective districts.[13]

An interesting, but short lived (until 1880), development was the provision in 1871[14] forbidding apprenticeship of a child without the consent of his or her parents,

> ". . . unless such parents reside out of this state, and have neglected or been unable to take charge of such minor, or neglected the guardianship, nurture and protection of the children, or where such parent or parents are rearing such child or children in habits of debauchery, dissipation, profligracy, vice or crime, or with excessive cruelty or inhumanity; when the chancellor, upon notice given to the parents, next of kin, or friends of such minor, if in the jurisdiction of the court, after full proof of such immoral rearing, and ruinous habits, or cruel and inhuman treatment, may interpose by placing such minor under moral rearing, by an apprenticeship to some suitable, humane citizen, with the advantages of moral culture and education, herein required, under a sufficient bond."

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[9]Id. c. XIV, art. 2, § 8.
[10]Id. c. XIV, art. 10.
[11]Miss. Rev. Code c. XXIII (1857).
[12]Miss. Rev. Code § 1978 (1871).
[13]Miss. Rev. Code § 629 (1880).
[14]Miss. Rev. Code § 1793 (1871).

Except for this nine year period of comparative enlightenment, the institution of involuntary apprenticeship remained under the Board of Supervisors until apprenticeships were abolished in 1946,[15] and was merely an instrument of economic charity, rather than one of character molding.

In 1916 the Mississippi Industrial and Training School "for the care and training of children who are found to be destitute, abondoned or delinquent" was established.[16] "Delinquent child" was defined as any child under 18 years of age "who violated any municipal ordinances or state laws" when the violation involved moral turpitude. "Destitute or abandoned child" was defined as:

> ". . . any child who is destitute or homeless, or abandoned or is in such an evil and immoral environment that such child is likely to develop into criminal practices unless removed therefrom and properly directed and trained, or whose environment seems to point to a criminal career."

The adjudication of cases under the act was placed in the hands of the judges of the Circuit and the Chancery Court, sitting without a jury.

Proceedings originated either by written petition by "any reputable person having knowledge" of such a child in the county, or by the discretionary handling as delinquency cases, of prosecutions of children under 18 for felonies, misdemeanors or violations of municipal ordinances. The Circuit Court could, if it wished, transfer such a case to the Chancery Judge for handling as a delinquency matter; and the Chancery Judge could transfer delinquency cases to the Circuit Court for investigation by the Grand Jury, and possible criminal prosecution.

In lieu of commitment to the Industrial School, the judge could "send the child to any other institution willing to receive him, which is or may be subject to inspection and approval by the court or by any person appointed by the judge, or the court may release such child on parole or probation, imposing such conditions upon both child and parents or guardian as may be deemed advisable, or . . . give such child into the care and custody of its parents or guardian, or any other reputable person, subject to supervision . . . [as stated above], provided that the judge may at any time make such changes in the care, custody or supervision of such child as the welfare of the child may demand."

In 1922 a minimum age of seven was established for children sent to the Industrial School. The question whether "destitute or abandoned" children could still be committed there was beclouded by the elimination of the foregoing definition of such a child, which definition had formerly been found in the section of the act entitled "What children to be admitted to the school." This issue seems never to have been judi-

[15]Miss. Code Ann. § 7170-04 (1942).
[16]Miss. Laws 1916, c. 111.

cially decided, and is now moot.[17]

The 1916 act also required the parents, guardians or custodians of such child, or any other person contributing to the delinquency, destitution or abandonment of the child "to do or omit to do any act or acts which the judge may deem reasonable and necessary for the welfare of such child." Failure to obey the court's order was punishable as contempt of court. This provision has in substance been carried over into both the succeeding juvenile acts.

The constitutionality of this act was upheld in the much cited case of *Bryant v. Brown*,[18] decided in 1928.

In 1928 the Chancery Court was vested with authority to order sums paid out of county funds "for the purpose of providing home care and maintenance and support for dependent and needy children."[19] In reaching its determination of whether the child was a proper subject for this in-home aid, the court was required by the statute to look into, not only the economic situation, but also "Whether the applicant is a proper person to have the custody and care of a child," and "Whether the home is a satisfactory place for the rearing of the child." The court could "impose such conditions upon the grant of the allowance as will promote the welfare of the child," and could have its representative visit the home "as often as may be necessary to observe the conditions which obtain in the home, the care which the child is receiving, and to offer such friendly counsel and advice as may be helpful to the mother or person in loco parentis and the child."

A great weakness in the foregoing law was in financing. The setting up of such a fund was entirely discretionary on the part of the Board of Supervisors, and the maximum size of such fund was set by statute at $2,500.00 for the entire county. There was the further difficulty that such support could not be given children over the age of fifteen. The entire procedure was abolished in 1946.[20]

In 1935 the United States Congress decided to do something about the widespread suffering of children caused by the great depression, and established "Grants to States for Aid to Dependent Children"[21] and "Grants to States for Maternal and Child Welfare."[22] These services were set up to be administered by the United States Children's Bureau, an agency of the Department of Labor, in cooperation with State public welfare agencies, and thus (along with the balance of the Social Security Act) furnished the stimulus for the creation of a Department of

[17]Miss. Laws 1922, c. 195.
[18]151 Miss. 398, 118 So. 184, 60 A.L.R. 1325 (1928).
[19]Miss. Code Ann. § 4011 (1930).
[20]Miss. Code Ann. § 7170-04 (1942).
[21]42 U.S.C. § 601, et seq.
[22]Id. § 701, et seq.

Public Welfare in Mississippi in 1936.[23] In 1953 the Federal part of this program was transferred to the new Department of Health, Education and Welfare, along with the balance of the Social Security program, and was placed under the Federal Security Administrator.[24]

A detailed discussion of the operation of the state and county Departments of Public Welfare is beyond the scope of this article, which is primarily concerned with the judicial aspects of the problem of neglected children, but the administrative and the judicial systems overlap at so many points it is impossible to have a full understanding of the functioning of the Youth Court without some knowledge of the Department of Public Welfare.

The Department of Public Welfare is charged with cooperating fully with the United States Children's Bureau (now the "Administrator") "in establishing, extending and strengthening child welfare services for the protection and care of homeless, dependent and neglected children and children in danger of becoming delinquent," and "in developing plans for said child welfare services and extending any other cooperation necessary under" the federal act.[25] It is also charged with the authority and duty:

> ". . . to administer or supervise all public child welfare services, including those services, responsibilities, duties and powers with which the county departments of public welfare are charged and empowered in this act; administer and supervise the licensing and inspection of all private child placing and child caring agencies, institutions and boarding homes; provide for the care of dependent and neglected children and those of illegitimate birth; supervise the importation of children; supervise the operation of all state institutions for children."[26]

Under the State Department of Public Welfare are county departments,

> ". . . authorized to provide protective services for children as will conserve home life; assume responsibility for the care and support of dependent children needing public care away from their homes; place children found by the department to be dependent or without proper care in suitable institutions or private homes, and cooperate with public and private institutions and agencies in placing such children in suitable institutions or private homes; accept custody or guardianship, through one of its designated employees, of any child, when appointed as custodian or guardian in the manner provided by law."[27]

Interesting exceptions from the authority of the Department of

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[23]Miss. Code Ann. § 7214 (1942).

[24]Reorganization Plan No. 1 of 1953, 18 F.R. 2053, 67 Stat. 613 (also found in note to 5 U.S.C.A. § 623).

[25]Miss. Code Ann. § 7169 (1942).

[26]Id. § 7170-01.

[27]Id. § 7170-02.

Public Welfare are "any orphan's home, child caring agency or children's home society under the jurisdiction of and maintained by any fraternal organization, religious or fraternal denomination or non-profit association or corporation organized and exclusively controlled by any religious denomination."[28]

The Departments of Public Welfare, along with "every public official or department" are required to cooperate in the furtherance of the Youth Court Act.[29]

The County Department of Public Welfare, under regulations made by the state department, administers the granting of financial assistance for "dependent children" under the act.[30]

> " 'Dependent child' means a needy child under the age of sixteen, or under the age of eighteen if found by state department to be regularly attending school, who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, great uncle or great aunt in a place of residence maintained by one or more of such relatives as his or their own home. Provided further that for the purposes of this act, all such relatives shall qualify as such whether the relationship be acquired by birth or adoption, and that neither divorce nor death shall terminate any such relationship."[31]

The foregoing definition is patterned after the definition in the Federal Social Security Act which provides Federal funds to assist in such aid to dependent children.[32]

In 1940 the legislature created the immediate forerunner of the present Youth Court by establishing a Juvenile Court Department in every Circuit Court where there was no County Court, and in every County Court and Chancery Court in the state. Such court was given jurisdiction over "all delinquent and dependent and neglected children" in its jurisdiction.[33] "Dependent child" and "neglected child" were synonyms meaning:

> ". . . any child under eighteen years of age who is destitute, homeless or abandoned, or whom lacks proper parental care by reason of default or habits of his parents, guardian or custodian; or whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care or other care necessary for his health, morals, or well being; or who engages in an occupation or who is in a situation dangerous to

[28]Id. § 7170-03.
[29]Id. § 7185-22.
[30]Id. § 7173.
[31]Id. § 7172.
[32]42 U.S.C. § 601, et seq.
[33]Miss. Laws 1940, c. 300.

> the health or morals of himself or others, or any child whose parents have deserted it and are unknown; or whose parents have abandoned, or refuse to exercise their parental responsibilities as guardian of the child."

Any reputable resident of the state could have an informal preliminary investigation conducted under the auspices of the court. If the investigation tended to prove the child to be dependent or neglected, "any person or probation officer" could then bring the case formally before the Juvenile Court by filing a petition therein.

Although the statute allowed the court to sit in chambers, in the discretion of the judge, this section appears to be at least partly nullified by another provision that "any person interested" had the right to appear, be represented by counsel, and demand a jury trial.

In the event of a finding of dependency or neglect the Juvenile Court could allow the child to remain in its home, subject to inspection and supervision by an officer of the court, or it could change the custody of the child to "any suitable institution in the county or state organized for the purpose of caring for dependent and/or neglected children, and which is able and willing to care for same," subject to supervision by the Department of Public Welfare, and "subject at all times to the orders of the court." Furthermore, the Juvenile Court could order any person contributing to the dependency or neglect of the child "to do or omit to do any act or acts . . . reasonable and necessary for the welfare of such child." Violations of the order could be punished as contempts.

The Juvenile Court Act also defined "delinquent child" for the first time in the state's history as:

> ". . .any child under eighteen (18) years of age who violates any of the laws of this state, or city ordinances, or who is incorrigible, or who habitually so deports himself as to injure or endanger the morals or health of himself or others."

A consideration of the lengthy provisions regarding delinquent children in the Juvenile Court is beyond the scope of this article.

The Juvenile Court was abolished in 1946[34] when the Youth Court was established.

In 1946 the Mississippi Children's Code Commission was created. The members of this Commission are appointed by the Governor, and serve without pay except for necessary traveling and subsistence expenses. This commission is charged with the duty to "make a careful study of: The conditions in this state affecting the welfare of children; the functions and facilities of the various agencies and institutions in the state charged with care, control, protection and rehabilitation of

[34]Miss. Code Ann. § 7185-27 (1942).

children; the present laws pertaining to and affecting children including the operation and effect of existing laws, the existence of conflicting, obsolete, or otherwise undesirable laws." The commission reports to each regular session of the state legislature.[35]

The most important single result produced to date by the Children's Code Commission has been the Youth Court Act of 1946, which was drafted by that Commission.

THE COURT SYSTEM TODAY

Mississippi has a patchwork quilt court system which cannot be laid out in one simple diagram. Every court in the state deals with neglected children in some way, thus necessitating the following fragmentary presentation.

There are 82 counties in the state.[36] Diagram I (diagrams of the Mississippi court structure can be found in appendix to this article) shows the judicial hierarchy for the 69 counties which do not have County Courts.[37] In these counties the Youth Court is a division of the Chancery Court.[38] The Youth Court is not shown on this diagram for reasons of simplicity, but will be treated later. All Mississippi Courts, with the exception of Municipal Police Courts, are elected by the general population every 4 years,[39] except that Supreme Court Justices are elected every 8 years.[40] Municipal Police Courts are appointed by the municipal governing authorities in all municipalities of 10,000 or more. In communities under 10,000 it is discretionary with the governing authorities whether the Mayor shall be the Police Court, or whether a separate Justice will be appointed.[41] Police Courts are also omitted from the diagram for the sake of simplicity.

The Justice of the Peace Courts are, in my opinion, the bane of the judicial system of Mississippi. There are five supervisor's districts in each county, each of which contains at least one Justice of the Peace, and some have two.[42] The only qualifications for being a Justice of the Peace are to be a qualified elector,[43] believe in a "Supreme Being,"[44] and have resided in his district for two years.[45] To be a quali-

[35]Id. §§ 7170-11, et seq.
[36]Id. § 3021.
[37]Only 13 counties have County Courts under the statute. Miss. Code Ann. § 1604 (1942).
[38]Id. § 7185-01.
[39]Chancery Court, Miss. Const. § 153 (1890), Miss. Code Ann. § 1227 (1942); Circuit Court, Miss. Const. § 153 (1890), Miss. Code Ann. § 1414 (1942); Justices of the Peace, Miss. Const. § 171; County Court, Miss. Code Ann. § 1608 (1942).
[40]Miss. Const. § 149; Miss. Code Ann. § 3313 (1942).
[41]Miss. Code Ann. § 3374-103 (1942). Certain municipalities operate under private legislative charters which may vary from the Code Charter pattern set out above.
[42]Miss. Const. § 170 (1890), Miss. Code Ann. § 2870 (1942).
[43]Miss. Const. § 250 (1890).
[44]Id. § 265.
[45]Id. § 170.

fied elector it is necessary to be able to read.[46] These courts have jurisdiction of all causes in which the principal amount in controversy does not exceed the sum of $200, and, concurrent with the Circuit Court, over all misdemeanors. Preliminary hearings in felony cases and in bastardy (filiation) proceedings are conducted by them.

The Municipal Police Courts may, for the purpose of this article, be considered as Justice of the Peace Courts, for the Police Justice has essentially the same criminal law powers. Two differences worth pointing out, however, are: First, the Police Justice may punish all violations of municipal ordinances, which ordinances may cover actions not touched by the state-wide laws. The meaning of this in controlling juveniles is obvious. Second, in towns of 10,000 and over the Police Justice is required to be an attorney-at-law, thus eliminating one of the objectionable features of Justices of the Peace.[47] In the smaller towns it is technically possible for the Mayor-Police Justice to be as judicially unqualified as the Justice of the Peace may be.[48]

All other judges of the state are required to have been practicing lawyers for 5 years, be at least 26 years old (30 for Supreme Court Justices) and have been 5 years a citizen of the state.[49]

In the Circuit Court-Chancery Court level we find the last remaining example in the United States of completely separate courts of law and equity. The Chancery Court is the court of equity, also having "full jurisdiction" over divorce and alimony, matters testamentary and of administration, minor's business, idiocy, lunacy and persons of unsound mind, and other matters such as certain real estate and taxation cases.[50] By statute, adoptions are handled by this court.[51]

The Circuit Court is the general court of "law", and has original jurisdiction in all matters, civil and criminal, not vested by the Constitution in some other courts.[52] All appeals from Justice of the Peace Courts and Municipal Police Courts are heard de novo in the Circuit Courts (when there is no County Court in the particular county).[53]

There are 18 Circuit Court Districts[54] and 17 Chancery Court Districts[55] in the state, each with only one judge. Thus, each judge has about five counties under his jurisdiction, and must make a physical circuit for the purpose of trying cases at each county seat. Some coun-

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46Miss. Code Ann. § 3235 (1942).
47Miss. Code Ann. § 3347-103 (1942).
48Id. § 3374-55.
49Miss. Const. §§ 150, 154 (1890); Miss. Code Ann. § 1608 (1942).
50Miss. Const. §§ 159, 160 (1890); Miss. Code Ann. § 1262 (1942).
51Miss. Laws 1955, c. 34.
52Miss. Const. § 156 (1890); Miss. Code Ann. §§ 1428, 2418, et seq. (1942).
53Miss. Code Ann. §§ 1198, et seq.
54Id. §§ 1394, et seq.
55Id. §§ 1215, et seq.

ties have two county seats, each with its seaparate court house and docket.

The Supreme Court sits in Jackson. It has no original jurisdiction.[56] It is the highest court in the state.

The above court system is firmly ensconced by the state constitution, protected by the great difficulty of amendment. Superimposed by the legislature upon this system are the structures of the County Courts and the Youth Courts.[57]

Thirteen counties qualify for and have County Courts.[58] Diagram 2 shows only the hierarchy for purposes of appeal, for the original jurisdiction of the County Courts overlaps all other courts' except that of the Supreme Court. In counties having County Courts, the Youth Court is a division of the County Court rather than of the Chancery Court.[59] Again, for simplicity, the Youth Court is not shown.

With but minor exceptions, the original jurisdiction of the County Courts completely concurs with that of the Justice of the Peace Courts. County Courts have jurisdiction concurrent with the Circuit and Chancery Courts in all matters of law and equity wherein the amount of value of the thing is controversy does not exceed $3,000.[60] Furthermore, the County Courts may try any felony cases not capital which are transferred to them by the Circuit Courts.[61] In counties having County Courts, all appeals from Justice of the Peace Courts are heard de novo in the County Court.[62] Appeals from the law side of County Courts are heard in the Circuit Court, and those from the equity side go to the Chancery Court. Appeals of felonies tried in the County Court (transferred from the Circuit Court) go direct to the Supreme Court.[63]

THE YOUTH COURT

In 1946 the Juvenile Court was superseded by the Youth Court.[64] Much more than the name was changed. The Youth Court was established as a division of each County Court in the state, and of the Chancery Court of each county in which no County Court is maintained,[65] and was given "exclusive original jurisdiction in all proceedings concerning any delinquent or neglected child" in the county, except where otherwise provided in the act.[66] "Child" is defined as a

[56]Miss. Const. §§ 146, 148 (1890), Miss. Code Ann. §§ 1146, et seq., 1945 (1942).
[57]These courts derive their constitutional basis from Miss. Const. § 172 (1890), which authorizes the legislature to establish and abolish "inferior courts."
[58]Miss. Code Ann. § 1804 (1942).
[59]Id. § 7185-01.
[60]Id. § 1604.
[61]Id. § 1605.
[62]Id. § 1617.
[63]Id. § 1616.
[64]Id. § 7185-27.
[65]Id. § 7185-01.
[66]Id. § 7185-03.

person less than 18 years of age,[67] but when the jurisdiction of the Youth Court attaches to a child, the court has authority to retain or resume jurisdiction over him until he becomes 20 years of age.[68] The statement of legislative intent was that the act "be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interest of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them."[69] To that end, the act made the wise distinction between delinquent children and neglected children.[70]

> " 'Delinquent child' is synonymous with the meaning of what is commonly called a juvenile offender, and means any child not less than ten (10) years of age whose occupation, behavior, environment or associations are injurious to his welfare or the welfare of other children; or who deserts his home; or who is habitually disobedient to or beyond the control of his parents, guardian or custodian; or who being required to attend school wilfully violates rules thereof, or wilfully absents himself therefrom; or who violates any state law or municipal ordinance; or who, by reason of being habitually wayward or habitually disobedient, becomes an incorrigible or uncontrollable child; or who so deports himself as to injure or endanger the morals or health of himself or any other person.
>
> " 'Neglected child' means a child whose parent, guardian or custodian, or any person legally responsible for his care or support, neglects or refuses when able so to do, to provide for him proper or necessary care or support, or education as required by law, or medical, surgical or other care necessary for his well-being; or who is otherwise without proper care, custody, supervision or support; or who, for any reason, and as the result of the faults or habits of anyone, lacks the special care made necessary for him by reason of his mental condition, whether said condition be mentally defective or mentally disordered; or who, for any reason, and as the result of the faults or habits of anyone, lacks the care necessary for his health, morals or well-being; or who is found in a disreputable place, or who associates with vagrant, vicious, or immoral persons."

Under the Youth Court Act, "probation officer" becomes "youth counsellor." The youth counsellors are obtained from either of two sources, in the discretion of the Youth Court: (1) The court may appoint one or more persons from an eligible list furnished by the state merit system, subject to the approval of the Board of Supervisors in the

[67]Id. § 7185-02.
[67]Id. § 7185-02.
[68]Id. § 7185-04.
[69]Id. § 7185-26.
[70]Id. § 7185-02.

case of a county appointee; and the municipal authorities in the case of a municipal appointee: or (2) the County Department of Public Welmare may furnish the counsellors. A youth counsellor may act for both a municipality and the county, and his salary be divided between the two according to agreement between them. The statute is silent[71] concerning who pays the counsellors that may be supplied by the County Department of Public Welfare, but it is to be presumed that such salaries would be financed out of the appropriations for that department. The youth counsellor is the general handy-man for the Youth Court, being required to perform "such services as may be required by the court to carry out the purposes and provisions of this act, and may utilize the technical services available through the state department of public welfare."[72]

One of the interesting features of the Youth Court Act is the recurring choice allowed the court as to whether it will use its Youth Counsellor, or instead directly invoke the facilities of the County Department of Public Welfare. This is first seen when the court is informed (and no formality is required for this information) that a child within its jurisdiction is delinquent or neglected. The court may in its discretion either authorize a formal petition to be drawn up immediately, or may make a preliminary inquiry to determine whether the interest of the child or the public require the court to take further action. As indicated, the court may use either of the above agencies as its investigative arm. After the investigation, the court, in lieu of a formal petition, may make an "informal adjustment for the best interest of the child." In 1956, 28 per cent of all neglect cases and 50 per cent of all delinquency cases reported were handled by informal adjustment (called "unofficial cases" in the reports of the State Department of Public Welfare). It is probable that the actual number of informal adjustments was greater than indicated by the reports, for only 13 counties reported such cases.[73]

Even the filing of a formal petition to have a child declared neglected does not necessarily mean an immediate formal hearing. The court may make further investigation,[74] including the ordering of a

[71]Except that, by virtue of a 1956 amendment, "In any class one county having a total population in excess of eighty thousand (80,000), according to the 1950 census, and having a total assessed valuation in excess of forty-eight million dollars (48,000,000.00), and in which there are both a youth court and a federal military base or encampment, the board of supervisors of said county may, in its discretion, levy a special tax upon all the taxable property of the county, not exceeding three fifths of one mill per annum, to be used in the payment of salaries and/or travel expenses of a youth counselor, or counselors, and the salary of a clerk-reporter of the youth court of such county, and such funds shall be expended for no other purpose." Miss. Code Ann. § 7185-21.5 (1942).

[72]Miss. Code Ann. § 7185-21 (1942).

[73]Mississippi State Department of Public Welfare, Youth Court Statistics 6, 7 (1942).

[74]Miss. Code Ann. § 7185-06.

physical and mental examination of the child. If the medical examination discloses that the child is "tubercular, feeble-minded or insane," the statute provides that the child "shall not be committed to any state institution for delinquent or neglected children, but shall be committed in the manner provided by law to the particular state institution for such disabilities or infirmities."[75] It remains to be seen whether the last provision will be construed as mandatory or directory. A directory interpretation would probably be better, especially in the case of a really competent Youth Court Judge, for there may be cases of such unwell children who would do better outside rather than inside state institutions.

Section 6 of the Youth Court Act[76] is a very full statement of the procedures of setting the time and place of hearing, service of process, insuring the presence of the child and any other necessary parties, and other matters preliminary to the hearing. I shall not detail this two-page-long section. Suffice it to say that the Youth Court is given ample authority to handle the situation, while at the same time there is due regard for both the right of the parents, guardians and/or custodians to have their day in court, and for the child not to be subjected to unnecessary and possibly traumatic experiences at the hands of the authorities. Pending the hearing and final disposition of the case, the court has ample authority to make temporary changes in the custody of the child.

Although "any person interested in any case" still has the right to appear and to be represented by legal counsel, both jury trials and public trials have been dispensed with. Only witnesses and directly interested persons are admitted to the hearing, which is conducted at any place selected by the judge, and "in an informal manner under such rules as the court may prescribe, without regard to the technicalities of other statutory procedures and rules of evidence." The proceedings are specified to be entirely civil, concerned "with the care, protection, and rehabilitation of the child in question."[77] Formal proceedings are entitled, "in the interest of....., a child."[78]

Upon the adjudication that a child is neglected the Youth Court acquires great power over (1) the child, (2) the parent, guardian or custodian of the child, and (3) third persons who have contributed to the neglect of the child. Although the rights of the parents are intimately tied up with the disposition of the child, for the sake of clarity of analysis the above three groups will be considered separately.

Neglected *and* delinquent children may be: (a) placed under super-

[75]Id. § 7185-11.
[76]Id. § 7185-06.
[77]Id. § 7185-08.
[78]Id. § 7185-05.

vision in their own homes under terms set by the court; (b) placed under such supervision in the "care of a relative;" (c) placed in a suitable family home; (d) committed to the custody of a "suitable private institution or agency able and willing to receive" them.[79]

Delinquent children may, in addition to the above possibilities, be committed to the custody of a state supported training school, provided the child be between the ages of 10 and 17, inclusive. Once sent to the training school, the delinquent child may be kept there until he attains his 20th birthday.[80]

The parent, guardian or custodian of either a neglected or delinquent child may be: (a) entirely removed as custodian of the child; (b) allowed to remain as custodian subject to such terms and supervision as the court may direct;[81] (c) required "to do or omit to do any act or acts which the judge may deem reasonable and necessary for the welfare of such child;"[82] (d) required to pay to the person or agency to which custody of the child has been granted, sums of money decreed by the court for support of the child;[83] (e) punished for contempt for failure to obey any order of the court in the above matters.[84]

Third parties "encouraging, causing or contributing to the neglect or delinquency" of the child may be required "to do or omit to do any act or acts which the judge may deem reasonable and necessary for the welfare of such child," under penalty of contempt proceedings for violation of the court's order.[85] It is to be presumed that only such third persons that have been made formal parties by summons or appearance, as provided by the act, may technically be within this power of the court.[86]

In addition to its control over the child, the parent, guardian or custodian, and the third party contributing to neglect or delinquency, the Youth Court has considerable power over the proceedings in other courts. While this power is nominally exercised as a choice between the adjudication of criminality on the one hand, and delinquency on the other, it definitely may affect neglected children, for all too often the child that is ostensibly a delinquency problem is in reality a neglected child—and if treated sympathetically as such may respond better than if treated as a delinquent. This power of the Youth Court may be exercised over the Circuit Court, in the case of felonies, and over the Justice

[79]Id. § 7185-09
[80]Ibid.
[81]Ibid.
[82]Miss. Code Ann. § 7185-12 (1942).
[83]Id. § 7185-10.
[84]Id. §§ 7185-10, 7185-12.
[85]Id. § 7185-13.
[86]Id. § 7185-06.

of the Peace Courts in the case of misdemeanors. The "felony" statute is too succinct for paraphrasing:

> "If a child thirteen years of age or older is charged with an offense which would be a felony if committed by an adult, the court, after full investigation, may, in its discretion, retain jurisdiction and proceed with the case as a delinquency case, or certify such child for proper criminal proceedings to any court which would have trial jurisdiction of such an offense if committed by an adult [the Circuit Court], and may fix the amount of bail, except that the circuit court shall have exclusive jurisdiction of such child if he be charged with any crime which, upon conviction, is punishable by life imprisonment or death."[87]

The Mississippi Supreme Court has interpreted this section, together with the statutory grant of "exclusive original jurisdiction in all proceedings concerning any delinquent or neglected child" in the county, as requiring such "certification" of the child by the Youth Court to the Circuit Court as a jurisdictional prerequisite to prosecution for felony.[88] In the case referred to, a writ of habeas corpus was allowed by the Supreme Court (reversing a lower court decision disallowing the writ), vacating the conviction for felony of a seventeen year old boy who was tried by the Circuit Court without the requisite certification.

The "misdemeanor" statute is in part as follows:

> "Whenever any child thirteen years of age or older is brought before any justice of the peace court or municipal court charged with the commission of a misdemeanor under a state law or municipal ordinance, such court shall, unless prosecution is permitted by order of the youth court, transfer the case to the youth court of the county, to be dealt with as a case of delinquency . . . [just as though originally brought before the Youth Court].
>
> "After conviction and sentence of any child so prosecuted for a misdemeanor, as above set out, by a justice of the peace or municipal court, the youth court of the county shall have full power to stay the execution of such sentence and to release such child on good behavior, or other such order as the court may see fit to make."[89]

One gap in the literal format of the foregoing sections is the power of the Circuit Court to try misdemeanors, a power which it possesses concurrent with the Justice of the Peace Courts. A literal reading of this section alone would still allow the Circuit Court to prosecute for misdemeanors without certification by the Youth Court. A liberal construction of the act, such as is clearly required by its own terms, would of course allow by implication the same restraint upon the Circuit Court that now expressly exists upon the Justice Courts. Furthermore,

[87]Id. § 7185-15.
[88]Wheeler v. Shoemake, 213 Miss. 374, 57 So.2d 267 (1952).
[89]Miss. Code Ann. § 7185-16 (1942).

the Youth Court's exclusive jurisdiction over juvenile delinquents—which includes children who have violated "any state law or municipal ordinance"—would seem to require such restraint upon the Circuit Court's power. It remains to be seen what the Supreme Court will do about this.

Because, as previously pointed out, there are 69 counties in the state which do not have County Courts and only 17 Chancellors to service them, the legislature saw fit to authorize the Chancellors of those counties to "appoint the chancery clerk or other suitable person to act as a regular or special referee" in Youth Court cases, the adjudication and order of such referee to "stand as the adjudication and order of the court unless modified or set aside by the judge of the court," who is required to "approve or disapprove" the same at the next term. Regular referees may permit the Justice of the Peace Courts to try misdemeanors, but no referee's order of commitment of a child to "any public or private institution" is effective until the order therefor is approved and signed by the judge."[90]

It is to be presumed that, for the County Court to prosecute a felony not capital (upon transfer of same to it by the Circuit Court) involving a child under eighteen, the judge of the County Court, acting as the Youth Judge, must first certify the child to the Circuit Court for trial, and only then may the case be transferred back to him as County Judge for trial. It may be further presumed that, for the County Court to try misdemeanors (thus exercising jurisdiction concurrent with the Justice of the Peace Courts) the Youth Judge must grant himself permission to try the case as County Judge.

No child under thirteen years of age may be prosecuted criminally for either a misdemeanor or a felony, but such case must be handled by the Youth Court.[91]

Appeals from the Youth Court are taken to the Supreme Court when the Youth Court is a division of the Chancery Court, and are taken to the Chancery Court when a division of the County Court. The decision of the Chancery Court in the latter type of appeal may in turn be appealed to the Supreme Court. The pendency of an appeal does not act as a supersedeas unless supersedeas be ordered by either the Youth Court or the Supreme Court. The statute is silent concerning whether the Chancery Court may order supersedeas when it hears such an appeal, but it is probable that this power will be implied.[92]

Once each year the State Department of Public Welfare collects statistics from the clerks of the various Youth Courts throughout the

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[90]Id. § 7185-14.
[91]Id. § 7185-17.
[92]Id. § 7185-24.

state.[93] Upon request for all available publications of these statistics, that department sent me pamphlets for the years 1948 and 1951 through 1956.[94] Although these statistics represent a great advance in the study of juvenile delinquency and neglect in Mississippi, they by no means afford a complete picture of the operation of the Youth Courts. There appear to be two principal reasons: (1) the incompleteness of the statistics, and (2) the lack of a completely uniform basis from year to year. If trends are to be studied fully it will be necessary in the future for a year-to-year format to be developed and stuck to with little change. For example, in some years the dispositions of neglect and delinquency cases are reported separately, whereas in other years they are not distinguished. Another annoying feature is that one year certain data are reported in numbers of cases, whereas in another year percentages are used.

As will be shown later, a more detailed geographical breakdown of the statistics would be quite valuable, for conditions vary greatly throughout the state. State-wide figures may misrepresent a given county-wide situation in precisely the degree that national statistics may fail to represent the situation in Mississippi. Special county-wide problems may thus be obscured.

The following table shows the growth of Youth Court activity since 1948. Some of this great increase is due, not to increased delinquency and neglect (although this is undoubtedly a great factor), but to the handling in Youth Court of a greater and greater percentage of juvenile matters that may find their ways into other courts.

Year	Counties Reporting	Active* Courts Reported	Inactive Courts Reported	Total** Cases	Delinquency Cases	Negl. Cases	Per cent Neglect Cases
1948	78	30	48	766	625	137	18%
1949	71***	36***	35***	849	654	195	23%
1950	62***	29***	33***	785	608	177	23%
1951	71	39	32	942	698	244	26%
1952	74	47	37	1310	1061	249	19%
1953	76	60	16	1455	1079	443	29%

[93]Id. § 7185-20.

[94]Mississippi State Department of Public Welfare, Youth Court Statistics 1948, 1951, 1952, 1953, 1954, 1955, and 1956.

1954	81	63	18	2339	1514	825	35%
1955	76	63	13	2283	1408	875	38%
1956	79	67	12	2571	2039	532	21%

*Some counties reported that no Youth Court cases were handled during the year.
**The total number of cases for any one year is slightly higher than the total number of children before the courts during the year, for between 4 and 6 per cent of the children involved appear twice, and a very few even appear three times.
***Scaled from a bar graph in the 1955 report.

The 1951 and 1952 reports are the only ones that give data on the distribution of Youth Court cases over the state (except for the location of "inactive" courts), and the 1951 report is the only one of these that gives a complete breakdown by counties as between neglect and delinquency, male and female, and white and Negro. The most striking revelation of these reports is that the vast majority of the cases, both delinquency and neglect, were reported from those counties which have County Courts and a town of approximately 30,000 or larger. In 1952 six counties reported 77 per cent of the state's Youth Court cases. In that year all but eight counties made statistical reports. These figures are made more meaningful when one examines the population statistics for the state as a whole. The foregoing six counties contain but 20 per cent of the state's population. An interesting study might be made to determine all the factors going into this situation, including not only the environmental conditions, but also the differences between the Youth Courts themselves. Another interesting inquiry would be whether there are any significant differences between those Youth Courts presided over by County Judges and those under the auspices of the Chancery Court. Two factors suggest that there may be such differences.

The first such factor is the presence of the County Judge in the county virtually all the time. That county is his sole concern. It is his home and usually is where he has practiced law before becoming a judge. He is naturally more familiar with it than would be a Chancellor who may live 75 or 100 miles away; and of course he is more subject to the unique pressures of that county.

The second such factor is the institution of the Referee. It is probable that the Chancery Clerk rather than some other "suitable person" is usually appointed in this capacity; Chancery Clerks of Mississippi are elected officials. It is unlikely that the judge will often reverse a ruling made by such a referee, if only on the same theory upon which appellate courts are reluctant to overthrow the verdicts of the triers of fact below.

The following are the data compiled by race.

	DELINQUENT		NEGLECTED	
Year	White	Negro	White	Negro
1951	55%	45%	52%	48%
1952*	50%	50%	50%	50%
1953	56%	44%	48%	52%
1954	60%	40%	50%	50%
1955	60%	40%	not available	
1956	60%	40%	not available	

*The figures for this year are the cases disposed of "officially." According to the report, "when unofficial cases are included in the totals, fifty percent more delinquencies were reported among white children than among Negro children." The report states that "three out of every five children in Youth Court were white."

Another interesting investigation would be to ascertain what effect Mississippi's "double standard" of behavior for the races has upon the bringing of cases into the Youth Court as well as upon their handling and disposition. The above statistics must be interpreted in the light of this social phenomenon, as well as in the light of the above discussed geographical concentration of Youth Court cases in only a few of the state's counties. The Negro population of the state is not evenly spaced. The 1952 report suggests that the small number of Negro girls in the Youth Court may be due in part to the absence of youth counselling work with Negro girls, and the lack of state facilities for rehabilitation of delinquent Negro girls. Such a correlation is beyond the scope of this paper.

The distribution by sex of neglect and delinquency cases has not fluctuated very much during the last four years reported. For both races males have represented approximately 55 per cent of the total neglect cases. Of the white delinquents about 78 per cent have been male; while of Negro delinquents about 84 per cent have been male.

The figures concerned with the distribution by age of neglected and delinquent children are quite interesting, and have been consistent enough through the years for some general conclusions to be drawn from them. There is a fairly constant number of cases until the age of nine. At that age, and in some years, at eight, there is a rise due to the handling, as neglect cases, of pre-delinquents who cannot under the law be classified as delinquents until they are ten years old, but who have nevertheless misbehaved. From age ten upward there is a rapid and very steady decrease in the number of children reported as neglected, accompanied by a sharp rise in the number of delinquents, until at the age of seventeen virtually all the children who come into Youth Court are brought in as delinquents. This of course does not mean that neglect of children has ceased to become a problem at that age. On the contrary, it may be even a greater problem, for undoubt-

edly many of the teen-age delinquents are also neglected children, and are delinquents for that reason.

Let us look at the available figures concerning the reasons for the request of Youth Court action in neglect cases:

	1952	1953	1954	1955	1956
Non-support	26%	48%	54%	41%	26%
Desertion or Abandonment	15%	7%	6%	13%	11%
Lack of Care and Supervision	14%	18%	15%	21%	40%
Delinquency	14%	8%	7%	5%	9%
Abused	13%	2%	2%	------	------
Neglect (Unspecified)	16%	16%	11%	15%	11%
Other*	2%	1%	5%	5%	3%

*includes immoral conduct of parents, disputed custody in broken homes, etc.

And let us look at what disposition the Youth Court made of some of these cases. (Unfortunately, the figures for 1953 and 1956 are not broken down as between neglected children and delinquent children; and unfortunately, the classifications of different years shown are not always identical. This tabulation represents a synthesis on the most common bases found.)

	1951	1952	1954	1955
Dismissed, case adjusted, or held open	26%	19%	56%	29%
Supervision in own home or in home of relative	56%	30%	17%	56%
Released on probation under supervision	6%	6%	1%	0.3%
Referred to a child-caring agency	------	38%	17%	7%
Supervision in foster-home	6%	4%	5%	5%
Referred to another court	2%	2%	3%	2%
Committed to State* Training School		*	*	*
Other	4%	------	------	------

*This is an illegal procedure in neglect cases. 1 such child was so committed in 1952, 6 in 1954, and 3 in 1955.

The above tabulation naturally gives rise to the question why the apparently great fluctuation in percentages as among the three most frequent methods of disposition of neglect cases: (1) dismissal, adjustment or holding open, (2) in-home supervision, and (3) referral to a child-caring agency. The jump in referrals to agencies from 0 in 1951 to 38 per cent in 1952, followed by a decline to 7 per cent in 1955 merits special consideration. It appears reasonable to expect a fair degree of consistency in the nature and disposition of neglect cases from year to year. Perhaps there is a fluctuation in the available

"spaces" with the result that in some years children are denied needed agency care (this hardly seems a complete answer). That larger facilities might sometimes function at less than 100 per cent capacity is no excuse for not having them when needed, even if the state must provide for the overflow. The appalling lack of private child-caring institutions for Negro children has already been publicized by the Mississippi Children's Code Commission.[95]

CONCLUSION

As can now be seen, there are many avenues in need of exploration. The Mississippi Children's Code Commission is doing just this kind of work, with study committees on Adoption, Children in Trouble, Education, Foster Care, Children in the Home, Day Care Services, and Health. Until July 1, 1956, this necessary and public-spirited organization functioned without an appropriation of funds from the state. It now has a budget of $50,000 for the biennium, which undoubtedly means that much of its important work is being conducted on an uncompensated basis.[96]

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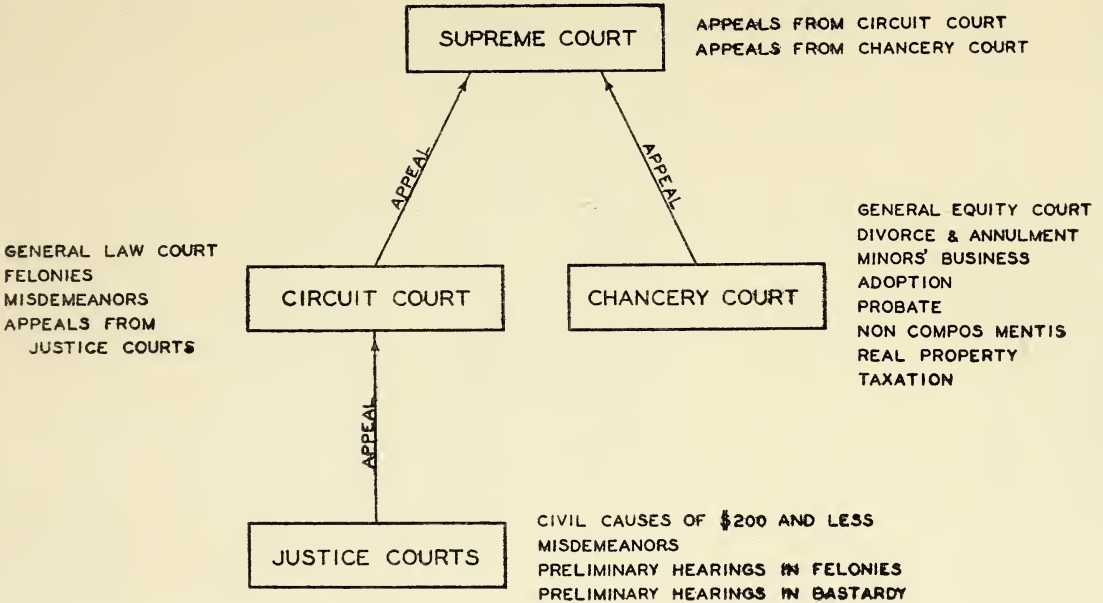
[95]The Mississippi Children's Code Commission, Mississippi Report on Services to Children and Youth, 1950 - 1955, pp. 59, 66.

[96]The Mississippi Children's Code Commission, Biennial Report of the Children's Code Commission to the Governor and Legislature for the period July 1, 1955 through June 30, 1957.

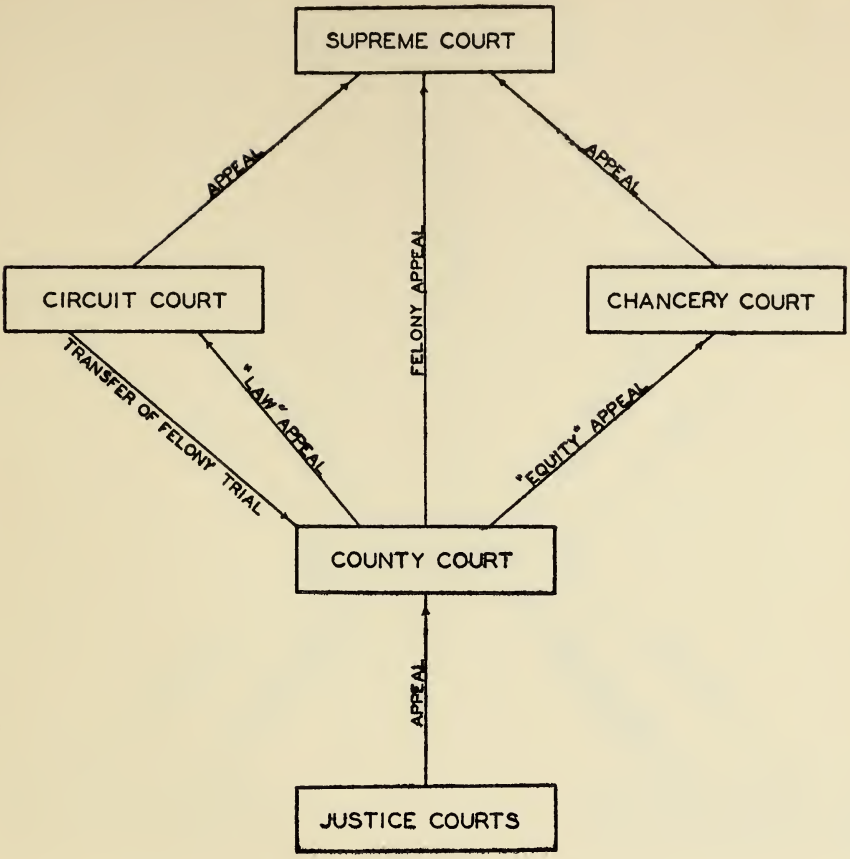
APPENDIX



COUNTIES WITHOUT COUNTY COURTS

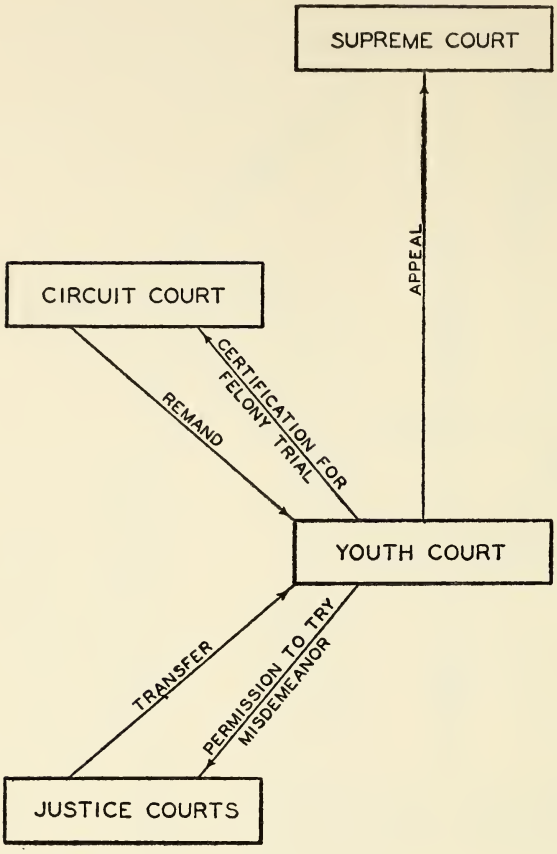
YOUTH COURT NOT SHOWN

DIAGRAM I



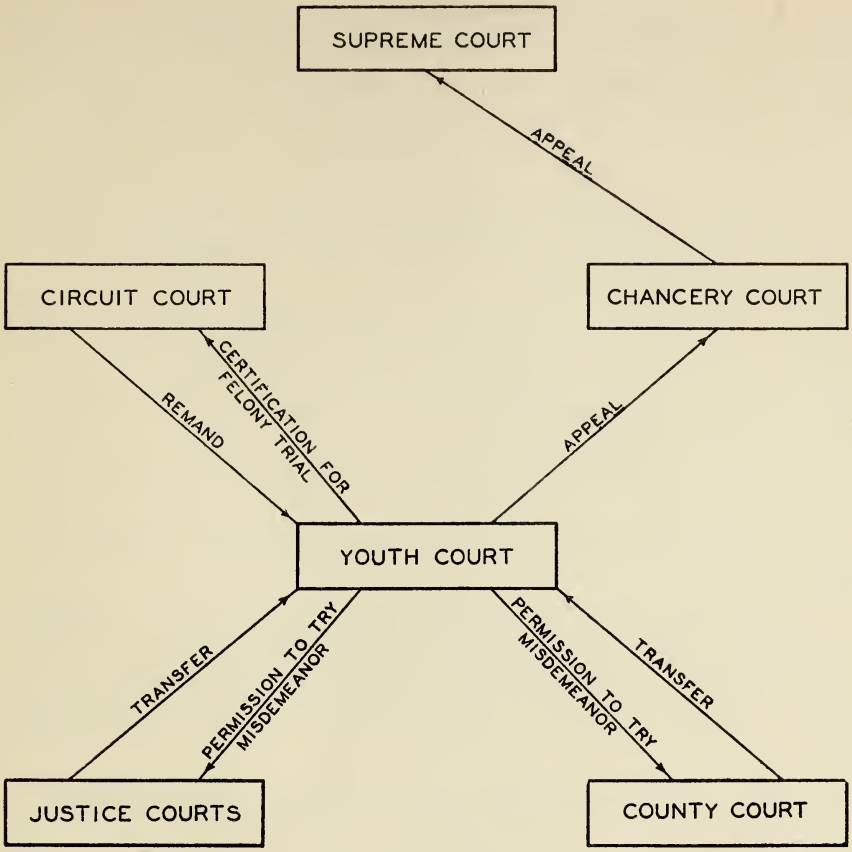
COUNTIES WITH COUNTY COURTS
YOUTH COURT NOT SHOWN

DIAGRAM 2



YOUTH COURT IN RELATION TO OTHER COURTS
IN COUNTY WITHOUT COUNTY COURT

DIAGRAM 3



YOUTH COURT IN RELATION TO OTHER COURTS
IN COUNTY WITH COUNTY COURT

DIAGRAM 4

THE SUPREME COURT OF THE UNITED STATES

*Ross A. Collins**

A speech on the Supreme Court of the United States is a subject so all-encompassing that it must be left to the one making it to decide his approach to its discussion.

The Court has been in existence more than 165 years and nearly 100 men have served as its judges, and these men have written thousands of opinions on practically every subject about which the nation, the states and their people have been concerned from the foundation of this country to the present time.

Since my remarks must be limited, the ideas that I will present to you will fall within two categories—both of which I consider political:

First, the Supreme Court of the United States is a policy-making body.

Second, how does this fact influence us, or how should it influence us, in deciding the type of men best qualified to be justices of the Court, and how they should be chosen for that Court. The approach here will include a brief analysis of the careers of several of the outstanding justices.

I. THE SUPREME COURT IS A POLICY-MAKING BODY

Unfortunately, most Americans have little knowledge of the Court —the mixed reasons for and against its creation, its far-reaching powers both given and assumed, its decisions as divergent as the thinking of the citizens of the republic, the individuals who have been its members, their political and economic views, their qualifications, their spites and prejudices and the other qualities that are found in men occupying high public office.

Their opinions give us a clue to them as individuals or as to their thinking. But they are not generally read, for they are thought to be technical, legalistic and difficult of understanding. Furthermore, the Court's opinions are printed not for general distibution but largely for lawyers; hence are not within the reach of the average citizen. Most people are too busy earning their daily bread to read them, and they do not have the time or the inclination to search out and read decisions of our highest court on questions they consider remote from their own lives.

Most Americans feel a slight responsibility for the election of the

*Attorney-at-Law, Meridian, Mississippi. This is a transcript of a speech delivered to the student body of the Unversity of Mississippi School of Law on May 9, 1957.

President and our Senators and Representatives in Congress. They participate in the selection of them. Members of the Supreme Court, however, are appointed by the President and the people feel no responsibility for their selection. They keep up with the acts of Congress and the work of the Chief Executive but not with the business of the highest court in the land. Even the bar of the country is not too much concerned with the decisions of our highest court, for its decisions are of a policy-making nature. The average lawyer is never employed to appear before that Court. His chief concern with that court is to be admitted to practice before it so that he may frame and hang on the walls of his office his certificate of admission.

The Supreme Court of the United States truly is and always has been a policy-making branch of the government. Its justices are public officers in a democracy. They are selected because of their political faiths and their decisions usually reflect the slant of their political thinking.

Some may believe that the Court decides the same class of cases and controversies as are considered in other courts, or the same character of litigation as is considered by the state supreme courts. That is not true now, nor has it been true for more than a hundred years. Its decisions are on the most important cases—the significant, the far-reaching, the momentous ones. These decisions may go unnoticed by the general public, even by lawyers, but they affect the rights and liberties of every citizen. Even the less important cases are far from routine. All deserve the careful attention and considered judgment not only of lawyers but of historians, political scientists and other thinking men and women, for they affect not only the welfare of the republic but the rights and privileges of its citizens. The Court's findings are of equal or greater import than are acts of Congress, for their decisions are the supreme law of the land.

Justices of our highest court are men just like the rest of us and they have political and economic convictions, and their opinions, from the founding of the government to date, very clearly reflect the predilections of the justices of that court. Some justices are liberal in their thinking while others are conservative. Their decisions are often by divided votes—a practice to be encouraged—and those in the minority have no hesitancy in stating plainly their disagreement with the majority. The reasoning of each reflects his liberalism or his conservatism.

The functions of the Court in policy areas extend:

1. To the interpretation of the meaning of the Constitution of the United States.

2. It interprets and construes the Acts of Congress.

3. It polices the relationships between the Federal and State Governments.

4. It polices the relationships between the States.

5. It is its own judge of its limitations.

6. And it has provided itself with the power to enforce its decrees.

The mere enumeration of these policy-making powers shows only too clearly that the functions of the Supreme Court of the United States are far different from the functions of a state supreme court or any other court or group of courts in the nation, and causes one to ask if the qualifications for appointment to justice of that court should be determined by the same standards as those for other judges, both state and national.

To understand the men who have been justices on the Supreme Court of the United States and their individual philosophies it is necessary to consider not only the judges' political background but their individual judicial opinions as well. It is not necessary to review the entire history of the Court for an appreciation of the worth of individual members of the Court and their basic philosophies. A reference to the decisions of any selected year or any one term will suffice. The cases decided in any one term and the various opinions of the justices will show that liberalism and conservatism are not without meaning when applied to our highest court and any one term will reflect this meaning as well as another.

At the 1946 term,[1] there were 142 cases decided; eight were of the highest political and legal importance. Twenty-nine of the other cases, while less important, were far from routine. They deserve the careful attention not only of lawyers but of economists, historians, and political scientists. The other 105 cases were those which were of less importance or which admitted of only one likely decision, even though a contrary decision would have made the cases of great public interest. One would be blind indeed to deny greatest importance to this field of policy decisions; they are the final findings on the questions decided.

The subject matter considered by the Court during the 1946 term embraced civil liberties, search and seizure, aspects of a fair trial, freedom of speech, regulation of labor, suits against the government, conservation of our natural resources, torts, issuance of patents, right-to-work laws, power to tax, monopoly and free enterprise, fifteen civil rights cases, the right to counsel, federal jurisdiction and procedure, religious liberty, and cases involving various constitutional questions.

Of the fifteen civil rights cases decided only three were unanimously decided; the rest were by divided opinions and both majority and minority opinions expressed the divergent political views of the justices.

[1]Frank, "The United States Supreme Court 1946-47", 15 U. Chi. L. Rev. 1 (1947).

The civil rights cases involved unreasonable search and seizure, the right to counsel, and kindred well known rights of individuals, and generally the rights claimed were denied on the facts.

By 1946 the Court's public law decisions had either stopped moving or were drifting to the right. The New Deal spirit in jurisprudence reached its peak about 1942 and was in recession in 1946. Scarcely a case decided during the 1945 term marked any material advance over anything gone before. In the field of civil rights,[2] anti-trust, trade regulation, the taxing power—the march had halted. Indeed one might go farther. The Court has concluded twenty years since President Roosevelt made his first appointment. The Court as a whole had become a more conservative body than the Court which convened in October, 1937. The Vinson Court—sometimes referred to as the Truman Court (although Truman's appointees did not express the liberalism of Truman)—became the Court's majority and, strangely, the conservative justices.

The part the Court plays in the way the nation is run can be seen in its decisions affecting the Constitution. The nature of that document is such that, as basic laws of limited size, the Supreme Court of the United States makes policy in interpreting its meanings. A decision affecting any section of the Constitution represents the majority opinions of the justices and their opinions reflect their political and economic concepts. The Court's history proves this to be true; also, that when the Court changes personnel, the opinions of the Court change, often to the extent of overruling their former opinions. Even the nature of the Court's business shifted from the nineteenth to the twentieth century—from private law to a public law docket.

A democracy is constantly changing and in recent years ours has traveled in many directions and rather suddenly; so has the Court, and its decisions formulate new policy and these decisions reflect the changing policy of the nation.

In periods of repressions, the rights of individuals as guaranteed by the Bill of Rights are pounced upon and restrictive laws usually follow, and our highest court has given but infrequent relief in stemming the repression. It becomes apparent that in the highest court, the law—whether it be the Constitution or the Acts of Congress—is necessarily what the justices of our highest court say it is, and basic changes of its personnel inevitably bring changes of doctrine and decision.

Justices are appointed by the President and as Presidents change, justices change as vacancies arise. Usually, but not always, the justices share the views of the appointing President. As Mr. Dooley, a humorist of long ago, said: "The Supreme Court follows the election returns."

[2]Civil rights as here used includes freedom of speech, press, public assemblage, liberty of religious worship, etc.

More recently another author noted that this happens "ten or twelve years later." The truth is that justices are human beings and have ideas and beliefs as do other public men, and their ideas and beliefs are written into their opinions. Charles Hughes, before he became Chief Justice of the United States Supreme Court, was quoted as saying: "We are under a Constitution, but the Constitution is what the judges say it is."

In a free speech case decided by the Court in 1951, the *St. Louis Post Dispatch* of June 5, 1951, commenting upon the majority opinion of the Supreme Court in that case under the heading, "Six Men Amend The Constitution," said that "never before has such a restriction been placed on the right to hold opinions and to express them."

"The public policy of a State or nation must be determined by its Constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public."[3] The sources of policy must come from these sources. But the last and final word is with the Court. Woodrow Wilson once said that the Supreme Court of the United States was "in fact a permanent constitutional convention." An early member of the House of Representatives in similar vein, but more bluntly, was quoted as saying: "No office John Marshall holds will be insignificant long."

Congress makes and interprets traditions, fundamental values, and social trends of our society within the general framework of enacting laws. The Supreme Court of the United States, although at this time sympathetic toward the enactments of Congress, however, does assume the power to strike down Acts of Congress. Its attitude in the past has not been so friendly.

II. QUALIFICATIONS AND SELECTION OF JUSTICES

Although the Constitution provides that justices of the Supreme Court shall be appointed by the President, by and with the advice and consent of the Senate, etc., in practice the President makes the appointment and the Senate meekly approves the appointment.

Only one justice was ever impeached and he was not convicted.

President George Washington, during his two terms, made the first eleven appointments to the Court, so he might be said to be the only President who ever "stacked the Court."

In the early days the Court had little to do and for long periods of time didn't even meet. Only a few cases trickled into the Supreme Court and they were of little importance. The early justices concerned themselves with their work as circuit judges and traveled over their various circuits—usually alone.

[3]Hartford Fire Insurance Company v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201 (8th Cir. 1895).

All of the men appointed to the highest court were lawyers, although legal training is not a qualification prescribed by the Constitution. Likewise, all appointments were political and they became justices because they were political friends of the appointing President. If politically sterile, they would not have been named. Once installed, they generally voted according to their political beliefs, as do members of the Senate, the House, city councils, or any other group of individuals.

In the light of history the vast majority of our Presidents have all too often made disappointing appointments to the Court and somehow these appointees did not grow in stature with their service; those that did grow were men already of great natural ability.

The justices of our highest court were all kinds of lawyers: students and idlers, the alert and the dull, the learned and the unlearned. All were politically-minded. Thirty-eight out of ninety-one of them had no prior court experience; ten had two years or less; twenty-three had between five and ten years and twenty had ten or more years on the bench. Of those that had prior court service only eight came from the Federal bench. Those that had prior court experience sat on courts of varying grades and significance and those courts dealt almost exclusively with private, not public, law cases.

These facts, together with the record that the justices with prior law-court experience made on the Supreme Court, will cause one to ask if such judicial experience is of such aid as would cause the President to select the judge-lawyer over the busy general practitioner, the lawyer-teacher, the political economist, the historian, and other qualified men of letters.

The historians of the Court have catalogued about a dozen justices of our highest court as being great judges—those whose works have shed luster upon that institution. Always heading the list is Marshall—not only because he was a great justice and influenced as has no other man the history of the country, but because he was likewise the first truly great judge. A short statement about Marshall and others should be made in order to give some insight into the reasons for their greatness. Their names symbolize the great historical issues with which they individually have been involved.

A. John Marshall

Born in Virginia, he was untaught save for the instruction his parents gave him and three short periods of schooling from a clergyman who stayed at the home of his parents. He read *Blackstone's Commentaries* in his youth.

He fought through the long years of the Revolutionary War with

distinction and afterward began his preparation for the bar at William and Mary College, the only public seminary of learning in the State of Virginia at that time. He attended lectures there for perhaps six weeks. He was admitted to the bar in August, 1780, and argued 113 cases before the Court of Appeals in Virginia in the period 1790 to 1799.

Elected to Congress in 1799, but prior thereto, 1797, was Minister to France on appointment by President Adams; later Secretary of State under Adams until named Chief Justice.

Marshall was but slightly equipped as a lawyer and informed himself largely from the knowledge displayed by his adversaries. After he became Chief Justice and throughout his long and epochal occupancy of this high place he showed this same pecularity. He didn't cite many authorities, and it seems certain he would not have relied upon "learning of the law" in any event, for later when precedents were abundant and accessible, he still ignored them.

On January 20, 1801, just before Jefferson was sworn in as President, Marshall was nominated as Chief Justice of the United States. And the battle between him and Jefferson began.

"If ever a figure in our history embodied in his career clear proof that ours is a government of men, not of laws, that figure is John Marshall, the great Chief Justice."

He established the supremacy of the judiciary over the rest of the Federal Government and was delighted in doing it. Since the *Marbury v. Madison* case, which was rooted in politics not in law, the Court has followed Marshall's concept of the superiority of the Court over both the Congress and the Executive. This only the ignorant would deny.

He did more than any other one man to centralize power in the federal government had wtaken the rights and authority of the states. The influence of his opinions is still generally accepted by the Court. And he wrote 519 opinions out of a total of 1106 during his tenure of office—and there were only seventy-four dissenting opinions.

B. Roger B. Taney

Taney came from Maryland. He was ugly in appearance, a brilliant lawyer, he knew good English and how to use it, and he was a shrewd politician.

He was a defender of the people against flagrant financial exploitation, and he championed the rights of separate states—states rights against national power.

Charles Warren, the historian, said of Taney that "it seemed evident that Taney would approach a case from the human standpoint."

Under Taney's chiefship the Court upset temporarily many of Marshall's pronouncements, but not for long.

Taney's work made his enduring imprint on the nation and its law. It has been stated that had he died eight years before he did, he might have gone down in history, one half deservedly, one half by happenstance, as the most liberal Chief Justice of them all. And further, it has been stated there was no Chief Justice for almost fifty years who could hold a candle to him.

C. Samuel F. Miller

History has given him but slight praise but by many worthwhile and forthright authors he was said to be one of the Court's ablest justices. Chief Justice Chase said of him that "beyond question he is the dominant personality on the bench."

D. John Marshall Harlan

Harlan is another who is worthy to talk about. Appointed out of political gratitude. Like Marshall, he had little legal education; was an unsuccessful office seeker in Kentucky. He was a Democrat that turned Republican. He was, nevertheless, an outstanding justice.

E. Oliver Wendell Holmes

Holmes was appointed by President Theodore Roosevelt at the age of 61 years. Wise, witty and intellectual, he was one of the truly great men of all time.

He had been for twenty years on the Supreme Court of Massachusetts.

He left his imprint upon the minds and hearts of men as did Thomas Jefferson, John Marshall and Abraham Lincoln.

He had an abundance of common sense and also knew the law and its humbuggery and did much to expose judicial, legalistic shams and legerdemain. Generally in the minority, and known as the great dissenter, his opinions expressed the hopes and aspirations of enlightened men. His two cronies on the bench were Justices Brandeis and Stone.

He outlasted seven Chief Justices, including Taft, and finally left the Court in 1932 at the age of 91.

F. Charles Evans Hughes

Hughes was a studiously inclined lawyer with ability. He became Governor of New York and was a member of the United States Supreme Court during Holmes' tenure for six fears. He became a candidate for President in 1916 and lost the presidency by only about 4,000 votes. He then returned to New York City and built up a lucrative praltice. He later became Secretary of State under both Harding and Coolidge and once more returned to New York and his law practice; later President Hoover appointed him Chief Justice of the Court.

He was a well-groomed and impressive-appearing justice, and I have always regarded him as an outstanding Chief Justice. This opinion is shared generally by those who have written the histories of the Court. Unfortunately for his reputation as a great jurist and Chief Justice, he sat with Holmes, Brandeis, Stone and Cardozo, all noted for their vision and wisdom.

G. Benjamin Cardozo

His ancestors came to America from Portugal in 1654. He was an appointee of President Franklin D. Roosevelt. He had been Chief Justice on New York's highest court. His appointment to the Supreme Court of the United States was opposed by Justices McReynolds, Van Devanter and Butler. His ancestors were ardent patriots when the British occupied New York. One of them acted as rabbi at the inauguration of George Washington and another was the first Jew to be made a trustee of Columbia University. He was not only a lawyer and a judge but a bookish man and spent his leisure in study and contemplation. He was known as the hermit philosopher. It is said by those who knew him that they never heard from him an off-color story or a word of inuendo against female virtue nor would one of them dare indulge in the mildest form of ribaldry in his presence. He was one of the most liberal men on the Supreme Bench.

In addition to his service on the bench he was professor of law at Columbia.

H. Harlan Stone

Stone was an appointee on the Court in 1925 after serving a year as United States Attorney General. There he appointed J. Edgar Hoover as head of the FBI and instituted noteworthy anti-trust litigation. He was a product of New England and graduated from Amherst in 1895; he was president of his class, right guard on a famous football team and a Phi Beta Kappa. He graduated from Columbia Law School in 1898, and later he became a member of the Wall Street law firm of Sullivan and Cromwell. He was dean of the law school at Columbia, and was loved and revered by his students more than any other professor of that day. He authored the minority opinion in the well-known AAA case and it was one of the most significant opinions ever written. He said "Courts are not the only agency of Government that must be assumed to have the capacity to govern," and "the only check upon our own exercise of power is our own sense of self-restraint." He was one of the less than a dozen great men to sit as a justice on the Supreme Court of the United States. Because of his unusual intellectual attainments and his knowledge of law and the culture and tradition of the times,

he was the bulwark of the liberal minority, and a shrewd and canny fighter. No military leader ever planned his moves more carefully than Justice Stone mapped his legal strategy.

I. Louis D. Brandeis

Although born in Kentucky, he was a product of Boston where he had attended Harvard Law School and was attracted by the atmosphere of that great school. He had a lucrative practice and, although a good business man, he gave his services as counsel without remuneration to people's causes, and as counsel in these cases appeared before the Supreme Court of the United States. His elevation to the Court was resisted by reactionary forces, including President Lowell of Harvard, William Howard Taft, and many others who followed the ultra-conservative line.

Justice Holmes and he were warm friends but entirely unlike one another in personality and attitudes. Justice Brandeis was a crusader while Holmes was a philosopher. He recognized the position of the Court in the affairs of the Republic and sought to write his liberal economic ideas into the law. He did not believe that the Court possessed the right to interrupt human progress and believed that "to stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. This court has the power to prevent an experiment—but in the exercise of this high power, we must be ever on our guard lest we erect our prejudices in the legal principles. If we would guide by the light of reason, we must let our minds be bold."[4]

He retired in February 1939, an old man who had wisely served his people and the citizens of his country; an Isaiah whose fervor had no need of vehemence.

J. Hugo Black

I hesitate to do more than call the names of the justices of more recent years who have been rated by the many authors whose articles and books about the Court I have recently read; however, Justice Black has been given high rank by many of them.

CONCLUSION

Much valuable information can be gathered by observing the variety of background of these ten men. Eight had no prior judicial experience; only Holmes, Cardozo and Black had prior judicial work and Black's covered about eighteen months, and on a minor court, in his early years of practice.

[4]Rodell, Nine Men; A Poltical History of the Supreme Court 1790-1955, at 228 (1955).

Of those justices named, Holmes, Stone, Cardozo and Hughes had been teachers of the law. Holmes and Cardozo had been teacher-judges, while Stone and Hughes had been teacher-lawyers. All four possessed great talent and the eminence of our highest court was enhanced by their presence on it.

All agree that it is imperative that worthy and capable men be selected for positions on the Court. What qualifications, therefore, are necessary? Certainly the history of the Court teaches that past judicial experience alone is not the answer; also that the general practitioner with certain experience in public office has made at least an equal, or perhaps better, record, while the law teacher-judge and the teacher-lawyer have done an excellent job on the Court.

Under the appointing system, the President of the United States is as well qualified to make appointments to the Court as anyone, for he has at his beck and call the considered judgment of his advisers in and out of the Government; and certainly he should be able to secure the services of superior men for the bench.

The system of electing judges, however, should not be dismissed, for under it state-elected courts have had many excellent men as judges, and a disinterested study by those seeking only the truth will prove this.

We are not so much concerned over the method used in selecting our judges; we *are* anxious to secure the services of forward-thinking men of honor and intelligence as judges for our courts, and especially is this true—and imperative—for the Supreme Court of the United States.

There is much that has been done by the Court in the past that we admire—and much, too, that we deplore. Nevertheless, all admit that our court of last resort still enjoys tremendous prestige. Maybe some day a majority of the justices of the Supreme Court of the United States will recognize that court's excesses, and suggest ways that it may divest itself of its judicial supremacy over the Congess and the Executive. Maybe out of the combined wisdom of the leaders of American democracy a better and a finer way can be found to keep the administration of justice in step with the march of progress.

State Bar Section

THE LAW OFFICE SYSTEM

*C. Sidney Carlton**

I. RECORDS AND FILES

Time is the capital of the lawyer. Since a lawyer's capital is constantly diminishing with each tick of the clock, every device and procedure which tends to make his office time more efficient or conserves it deserves serious consideration.

It is our observation that most Mississippi lawyers—and perhaps most lawyers everywhere—think of records and filing as necessary evils and purely mechanical performances by clerical help. It is the writer's opinion that care and intelligence are required for a satisfactory and proper record and filing system.

The system has a higher purpose than the mere preservation of papers. Preserved papers which are not easily found or readily available are no better because housed in a modern metal cabinet than those pitched helter-skelter in the old round barrel. The mechanics of filing are onerous and involve drudgery, but the elements which *should precede* the physical placement in the file are everchanging and thought-provoking.

There have been many articles, pamphlets, and booklets published on the subject of systematic office management and procedures, but it is our observation and experience that most of them have been written from the viewpoint of the metropolitan law firm with a large staff of associates and clerical help, which limits their usefulness for the average Mississippi lawyer.

We hope to present a system which is practical for you and which represents adaptations of other systems which make for easy use and operation in your office. We acknowledge our indebtedness to other writers and other publications in the preparation of this article. A list of these is found in the bibliography.[1]

A. Opening the File

The first determination to be made regarding any new matter is whether or not a new and separate file should be opened. This

*Carlton & Henderson, Attorneys-at-Law, Sumner, Mississippi. This is the first of a series of articles concerning law office organization and management being prepared by various members of the Conference of Local Bar Associations, a section of the Mississippi State Bar Association.

[1]Wilson, "Common Sense in Advocacy; Some General Observations on Trial of a Suit", 43 A.B.A.J. 600 (1957).

leads us to consider what files are necessary or desirable in the law office. There are many acceptable methods in use. The following three basic types of files are recommended:

(1) General alphabetical correspondence files;
(2) General subject matter files for non-recurring and quickly completed transactions; and
(3) Individual files for *each client* for *each transaction* not immediately concluded.

These first two types are continuing files and are constantly open for the reception of new matter. The third type requires an individual folder.

Most matters about which a lawyer is required to write should be docketed and filed; however, general correspondence and other items not involving the drafting of legal opinions or instruments, or not concerning specific legal questions do not require docketing or separate filing. The volume of these matters is usually small and finding them in a general file is relatively prompt and simple. In this system a folder is set up for each letter in the alphabet and papers are filed chronologically therein.

If the matter involved is only the drafting of a simple instrument which will be promptly completed without the necessity for particular study or research, there is no necessity for the opening of a file in regard thereto. Such instruments are filed under the general matter files referred to above. Examples of this type of filing are warranty deeds, deeds of trust, and contracts. A consideration of this type of filing involves subject matter indexing which is discussed later.

All other matters in the office should be separately filed in an individual folder. Separate folders should be set up for each transaction for each client. Different transactions for the same client should not be included in the same file. This would appear to be too elementary to be disputed; however, many lawyers, through lack of forethought, fail to follow these principles. The time and effort consumed in properly organizing and filing for one entire month will often be consumed in one search for a poorly filed document, in the loss of a train of thought while preparing an instrument, or in the examination of a single witness. Time lost while papers are leafed through in search of one elusive page in an unwieldy and unseparated file is time wasted.

When trials are involved:

> ". . . disorganized files and similar mechanical disorders . . . slow up the pace of trial and destroy that time and precision so essential to effective presentation. And worse still! They upset the composure, poise and confidence of the trial lawyer. His resources of mind and

emotion which should be held in readiness for unpredictable emergencies are, in fact, devoted to matters of mechanics."[2]

B. Indexing

Indexing a matter in the office is keying it to future usefulness. Memory is no index at all. Relying on memory leads only to errors and mistakes. It is surprising that a lawyer, who daily deals with the fallibility of human recollection, should rely on memory to keep his clients' affairs and files in order.

Indexing is not usually a matter for the stenographer, clerk, or secretary. Office workers are rarely trained in legal principles for this important function, and such employed personnel is subject to change. A filing system, to be of maximum value, requires understanding of the subject matter and continuity of handling and approach.

The lawyer handling the matter can best determine the nature of the file and the proper method of indexing it.

The following office forms are recommended for use in the modern office. The forms presented in these articles have been developed out of need, experience, and experimentation, and have proved practical and effective in at least one office in Mississippi. Some changes therein may adapt them to better usefulness in your office.

Some of these forms may be mimeographed or printed. Others, reasonably similar, may be purchased already printed. The first form, called "Docket Information", should be bound in pads and a pad placed on the desk of each lawyer in the office. This form is 8 1-2 inches x 5 1-2 inches.

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[2]Bibliography: Gerhart, "Practicing Law: The Case for the Individual Practitioner", 43 A.B.A.J. 793 (1957); Price, "Personal and Business Conduct in the Practice of Law (Law Office Management)", Committee on Continuing Legal Education of the American Law Institute; Smith, "Law Office Organization", A.B.A.J.; Smith, "A 1956 Sequel: Law Office Organization", 42 A.B.A.J. 144 (1956); The Practical Lawyer, Law Office Manual (1956); Addresses by Robert F. Payne and Paul Carrington on law office management, ABA Section of Bar Activities and The Law Society 1957.

Form No. 1

DOCKET INFORMATION

Serial No.:
Subject Matter Index Symbol: T-A
Client: Wilson, Edward
Address:
924 Walnut St.
Downtown, Miss.
Telephone: FI-5-4381

Detailed Subject:
Personal injuries in automobile accident at Marks

Index Also in Names of:
vs.
Johnson, Sam

Make Folder? Yes No
Make Time Sheet? Yes No
Make Ledger Sheet? Yes No

Cross References:
Wilson, Mrs. Mary vs. Johnson, Sam
No._____

To this form may be added a space for the initials or name of the lawyer handling the matter, if there are a number of lawyers in the office.

This form is self-explanatory and should be filled out by the attorney consulted by the client as soon as he has determined that the matter should be indexed. The attorney fills in the name of the client, his address and telephone number; a brief detail of the subject matter; the names of other parties involved, such as grantees, defendants, etc.; and he determines whether a separate folder, a time sheet, and a ledger sheet are required and notes any cross references to other files in the office. All these matters are more or less routine, and may be done in the matter of a moment during the interview without loss of time.

Some firms use a similar form punched for loose leaf filing, and prepare it in duplicate with one copy going into a master docket and one going into the docket of the lawyer handling the transaction. These remain in the respective dockets until the matter is concluded and the fee paid. Other firms make a third copy which is placed in the file folder.

The most important determination is that of subject matter and the indext symbol to indicate the same. This is an arbitrary matter and

may be of an infinite variety. It should be keyed to the particular needs of the practice of the lawyer or firm but should be sufficiently detailed that like matters are filed in like manner. Thus immediate reference may be had to previous transactions involving similar subject matter or legal principles, with the resulting saving of time.

As illustrative of these subject matter symbols we list the following:

Index Symbols

Abstracts	Abs
Account Actions	AA
Actions on Contracts	CA
Adoptions	Ado
Administrations	Adm
Annullments	Ann
Assignments	Asgn
Attachments	Att
Attorneys—Powers of	POA
Automobile—Torts	T-A
Bond Issues	BI
*Bills of Sale	BS
Change of Name	N-C
*Contracts	C
Contract Actions	CA
Cooperatives	Coop
Corporations	Corp
Criminal Cases	Crim
*Contracts for Sale and Purchase	CS&P
*Certificates of Lien	CL
*Conditional Sales Contracts	CSC
Certificates of Title	CT
Divorces	D
Drainage & Levees	D&L
*Deeds—	
*Quit-Claim	QCD
*Timber	DTim
*Trust Deeds	DT
*Special Warranty	SWD
*Leases	L
Levees—Drainage	D&L
Minority—Removal of Disabilities of	MD-R
Miscellaneous	Misc
Municipal Matters	MU
Name, Change of	N-C
*Notes	N
*Partnership Agreements	PA
*Powers of Attorney	POA
Possession of Real Property	PRP
Purchase—Contract for Sale and	CS&P
*Quit-Claim Deeds	QCD
Replevin	R
Releases	Rel
Removal of Disabilities of Minority	MD-R
*Sale—Contracts for and for Purchase	CS&P
School Matters	S
*Special Warranty Deeds	SWD
Summons & Seizure	S&C
Title Confirmation	TC
Tax Land Patents	TLP
Tax Matters	TM
*Timber Deeds	D Tim
Title—Certificates of	CT
*Warranty	WD
*Vendor's Lien retained	D-VL
*Deeds of Trust	DT
Disability of Minority Removal	MD-R
Election Matters	EL
Eminent Domain	ED
Enforcement of Judgments	JE
Foreclosures	F
Federal Administrative	FAdm
Guardianships	G
Garnishments	Gar
Judgment Enforcement	JE
Torts—	
Automobile	T-A
Other	T-O
*Trust Deeds	DT
Veterans Affairs	VA
*Vendor's Lien—Deed with	D-VL
Wage Actions	WA
*Wills	W
Workmen's Compensation	WC
*Warranty Deeds	WD

*General Subject matter files.

It is noted that several of the headings in the above table are repeated for the sake of ease in locating the proper index symbol regardless of the manner in which the particular lawyer thinks of the subject.

This list of index symbols an dof keys thereto may be contracted or enlarged in any way which is desirable to the individual lawyer or to the type of practice in which he is engaged.

Those marked with an asterisk are those general subject matter files for non-recurring and quickly completed transactions, and do not, therefore, require the making of a new file for each docket number.

All transactions which are indexed under one of the other index symbols require a separate file folder.

The attorney filling out the docket information sheet enters the appropriate index symbol on the sheet as derived from the foregoing table or similar one. The secretary or file clerk handling the actual filing usually assigns the serial number, though this may be done by the lawyer who practices alone.

The serial number system is very simple. We suggest the use of the last two digits of the year in which docketed, followed by the number of the transaction, with the index symbol at the end referring to the subject matter of the file. Thus a file numbered 551324-CA (or 55-1324-CA) would be a matter docketed in 1955 and would refer to matter number 1324 in the office. The subject matter involved is an action based on a contract. 573218-T-A (or 57-3218-T-A) would be an automobile tort case docketed in 1957 with the office serial number 3218.

This is a simple numbering system which gives useful information with a minimum of effort. Each succeeding matter is given the next succeeding consecutive serial number. The serial numbers may begin with "1" each year (i. e., 58-1-CA), or the serial numbers may be continued into the new year without any break.

The docket information sheet is filed with other relevant papers in the file and becomes a permanent record.

We suggest the use of plain 3 x 5 inch file cards for the recording of indexing information, though some prefer the use of multiple carbon forms so that typing of information is required only once. We find that the handling ease of the file cards is more advantageous than the time-saving resulting from the use of multiple carbon forms.

When the file clerk has assigned the serial number to the transaction, she then prepares a 3 x 5 inch subject matter card. Such card for a warranty deed from John Smith to Willie Jones would appear as follows:

Form No. 2

571234-WD

SMITH, JOHN

To:

Jones, Willie

Lot 1, Block 3, Town of Sumner.

Cross-Reference: 571235-DT.

By the cross-reference we note that a deed of trust was also drafted in connection with the transaction, and the serial number thereof is indicated.

A subject matter card file is maintained with headings for each index symbol and the subject matter cards are filed behind the appropriate symbol in ascending numerical sequence. It is to be noted, however, that by the nature of the serial number assignment, only infrequently or accidentally will consecutive numbers appear behind an index symbol.

At the time of the preparation of the subject matter card the file clerk will also prepare alphabetical cards containing the same information with a card being prepared for each person named on the subject matter card. These would appear in the following manner in our illustrative case above:

Form No. 3

SMITH, JOHN

To:

Jones, Willie

Lot 1, Block 3, Town of Sumner.

Cross-Reference: 571235-DT

571234-WD

Form No. 4

Jones, Willie

From:

SMITH, JOHN

Lot 1, Block 3, Town of Sumner.

Cross-Reference: 571235-DT

571234-WD

The use of capitals for the name of a party indicates the person who is represented in the transaction by the lawyer or firm. These cards are then filed in an alphabetical card file.

Experience has shown that alphabetical indexing only by the name of the client is inadequate—particularly for an office with appreciable trial practice. The making of cards for *all parties* involved in each transaction not only makes the location of particular transactions

easier and faster, but this alphabetical index furnishes valuable assistance in jury selection for trials and in the appraisal of adverse witnesses in cases. It is important to an efficient law office system.

C. Opinion and Briefs

Prior opinions and briefs furnish a gold mine of assistance in later situations and are usually much more helpful than annotations from law books because they are keyed to our own statute and decision law, yet in most offices they are extremely difficult to locate after time has erased the names of the parties from the mind of the lawyer.

Whenever a brief opinion is written it should be indexed by appropriate and sufficient subject matter or word index type entries on separate cards to make its location a simple matter. These cards can be very short and may be somewhat in the following form:

Form No. 5

Witnesses

Necessity for subscribing witnesses to will to sign in the presence of each other.

571432-Adm

This is one feature of the system which is hard to reduce to routine since it does not occur too frequently, but its importance cannot be over emphasized.

The cards are merely filed alphabetically in a card file.

D. Attention Docket

Procrastination is not only the thief of time, but also may be the thief of clients. Unnecessary or unreasonable delays in the lawyer's office, or failure to give prompt attention to a client's business, may react adversely against the entire profession and drive business from a

particular lawyer's office—often from lawyers' offices generally. Therefore, a most important adjunct to an efficient office is an attention docket. A matter should be set up for a followup or for attention on a given date.

A most effective way to do this is through the use of *Lawyer's Day*, which combines in one book the functions of an appointment book, a "tickler" remainder system, daily, weekly, and monthly work planner and separate daily time sheet. This publication uses two facing pages for each work day in the year. One of these is for recording appointments and scheduled events, and in a separate column, matters to be done that day, with another full page for recording services performed and the time expended thereon for that day. It is easy to keep and is a constant reminder of work to be done.

Another method, used by many lawyers, is a card file containing the months of the year with each followed by the day of the month. When a matter is set up for attention on a given day, a card so indicating is placed behind the appropriate date. Frankly, this system is somewhat cumbersome for a small office, and it has been discarded in the writer's office in favor of the use of *Lawyer's Day*.

The secret of success, however, of any "reminder" system is its reduction to routine so that it is kept up to date as a matter of habit. It cannot, of course, remind the lawyer of events which are not recorded!

E. Trial Docket

Another important docket necessary for efficient attention to business by the lawyer is a trial docket to show when pleadings are due and trials scheduled.

Many lawyers combine this docket with the appointment portion of a system such as *Lawyer's Day* and this is probably the most efficient system for the small office.

In many offices, however, a record of each case, in addition to this, will be helpful. This is especially true when there are more than two lawyers in a given office. These should be in loose leaf form and kept in a binder until the case is disposed of. A very good form for this purpose has been devised by Eaton, Cottrell & Galloway of the Gulfport bar:

Form No. 6

IN THE _____ COURT COURT CASE NO_____

COUNTY_____

PARTIES	ACTION
_____ _____ Vs. _____ _____	

Date	PROCEEDINGS IN CAUSE AND DISPOSITION OF CASE

Date		Charges	Date		Credits

Another and more detailed form is used by Wells, Thomas & Wells, of Jackson. This docket has spaces for recording court information; procedural and appelate court steps; preparation on law and facts; and closing information. If you are interested in this form, that firm would be happy to make a copy available to you.

II. TIME RECORDS

A. Lawyer's Daily Record

The need for time records is too obvious to require justification, but their use by lawyers in Mississippi has been so limited and infrequent in the past that when such records are discussed, many of our lawyers say, "They take up too much time;" "They are too much trouble;" or "There is no need for them.'

Few lawyers who take this position will ever keep time records conscientiously. Even when they do keep them, they do so half-hearted-

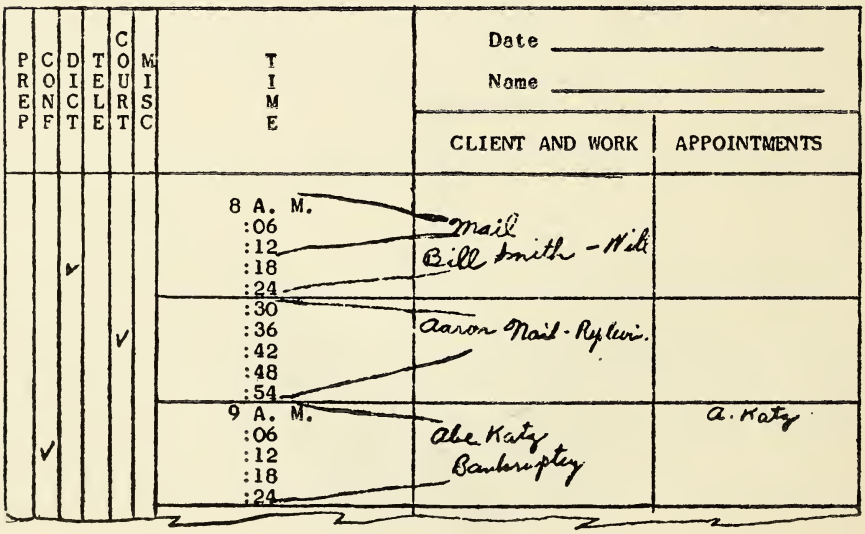
ly, and their lack of belief in them usually prevents effective use—or, at least, limits their effectiveness.

It is not the purpose of this article to attempt to justify the use of time records. Experience has proved that the use of such records will increase the gross income of lawyers and will result in better client satisfaction with fees charged. In addition, time records furnish helpful information on which to base proper charges and supply valuable accounting data.

There are a number of different forms available for keeping daily time records. We particularly like one divided into 6 or 12 minute intervals such as suggested in *Law Office Manual,* because time may then be kept in hours and tenths, which is advantageous in totaling time.

One type of this form includes columns used for checking the type of activity in which the lawyer is engaged, thus reducing the time and effort required to record his work. Space also may be included for recording appointments. The top portion of such a page with appropriate entries of time use would appear in the following form:

Form No. 7



An excellent form is supplied in *Daily Log for Lawyers* published by Colwell Publishing Company, Champaign, Illinois. The time form in this system is divided into half-hour periods. It is part of an integral system of record keeping which includes forms entitled: Roster of Business, Litigation Docket, Estate Docket, Check Register, Cash Receipts Record, Payroll Record, and Annual Report Forms. The writer has used this system and found it very good. It is similar in many

respects to the basic system which we are here suggesting.

The *Lawyer's Day* system, which we have referred to before, has its time records set up in 15 minute periods.

The essential thing is to *record the time* which is devoted to a particular activity in the office. If it is approached as a chore, it will be burdensome. If, however, it is considered an important routine, such as reading or signing the mail, it will not be burdensome, and if the financial rewards resulting from it are kept in mind, it will be a pleasure.

It is not strange that lawyers, who traditionally and actually resist any degree of regimentation in everything, often seem instinctively to shrink from the fancied demands of time records. Yet the CLBA will feel that its time and efforts are well spent if it can promote the use of them and of other systematic office procedures by Mississippi lawyers.

B. Lawyer's Daily Summary

The time records of a law office are useful for several purposes. Some offices use these records in cost accounting to determine hourly rates for charges. Others use them to determine the hourly income from various types and categories of practice in which the office engages. Others use these records only for fee determination in specific matters of business handled by the firm.

If a particular office desires to know the hourly rate from each transaction handled, the posting of all entries on the daily time sheet will be required. At the other extreme is the office which desires records of only those matters on which the hours worked will form the basis for the client's bill. There are a number of "in between" points at which other offices stop.

Some firms want to know the general hourly income from various categories of business handled by the office, but are not particularly concerned with the hourly return from each individual item unless the charge is to be based on an hourly rate. In order to do this, it is necessary only to post to a time ledger the time used on matters which may possibly be charged on a time basis and to post the other time to a few general time accounts.

For instance, production income may be divided into the following categories: Circuit Court, Chancery Court, J. P. Court, Office Fees, and Retainer Fees. Under such an income division, a separate time ledger account would be set up for each of these categories, for non-productive time, and for each transaction for each client on which an individual record is desired.

The actual posting is a clerical task, but it is greatly simplified by the use of a form which we call "Daily Time Summary." On this form,

at the end of the working day or at the beginning of the next day, the lawyer consolidates the work shown on his daily time sheet to the "Daily Time Summary," listing the matters for separate posting. Since this form provides the detailed records from which billing is done, enough explanation of the work involved should be included to make the posted record complete. The suggested form is as follows:

Form No. 8

Summary of	Day	Date	Hrs.	10ths
CARLTON	Tuesday	Nov. 19, 1957		
Circuit Court (List Matters)				
Chancery Court (List Matters)				
J. P. Court (List Matters) aaron Nail - Try Replevin				5
Office Fees (List Matters) Bill Smith - Will. D/T for Joe Mims. D/T for John Ames. C/T for Bank of Webb.			3	1
Retainer Fees (List Clients) Planters Gin				2
Client Abe Katz - Bankruptcy				5
Client Wilson Oil Mill - Lane foreclosure Prepare notice of sale + conference Campbell			1	4
Client _____				
Client _____				
Non-Productive Time			2	1
TOTAL TIME			7	8

These summaries are then posted by the bookkeeper and filed in chronological order.

The use of this form is not mandatory to the efficient use of the

system but is very helpful and serves to focus the individual lawyer's attention on whether or not he has efficiently used his time during that particular day. It will also indicate whether each member of a firm is bearing his proportionate part of the office work load.

C. The Time Ledger

Regardless of the purpose for which time records are kept in the particular office, time is posted—just as money—to a ledger. There are a variety of ledger pages which may be used. We particularly like the one published by Colwell Publishing Company for use in connection with its *Daily Log for Lawyers* to which reference has been made earlier.

This particular ledger sheet serves both as a time ledger and as an account ledger for the client. If the daily time summary is used, posting is from that sheet to the ledger. If it is not used, posting is to the ledger directly from the lawyer's daily time record.

The total productive time is carried in this time ledger and from each client's page may be determined the hourly income from his particular business. From the total time in the ledger and from the total receipts shown by other records in the office, the hourly income may be determined. The system lends itself to adaptations to furnish a variety of information as desired or helpful to the particular office.

CONCLUSION

The committee and officers of the CLBA will be delighted to receive any suggestions and answer any questions which you may have in connection with this and succeeding articles on the subject. We wish to impress on you the thought that, as lawyers, your time is your capital. It may be wasted or profitably used, as you alone will determine.

REPORT OF COMMITTEE ON MAINTENANCE OF CONSTITUTIONAL RIGHTS OF THE STATES AND OF INDIVIDUALS*

WE, The Committee on Maintenance of Constitutional Rights of the States and of Individuals, recommend to the Mississippi State Bar the adoption of the following resolution:

"WHEREAS, a year ago, the Bar of this State, in convention assembled, adopted a resolution deploring the usurpation of sovereignty of the several states by the Supreme Court of the United States; and

WHEREAS, this course of the decisions, we believe, has continued and broadened into other phases of State Sovereignty, and if it continues will ultimately nullify the authority of the sovereign States and will operate to render obsolete the term 'States Rights' as we presently use and understand the term; and

WHEREAS, since the opening of the October, 1956 term, we believe, decisions of the United States Supreme Court have been rendered without regard for precedent or established rules of constitutional interpretation, which have resulted in increased strife, confusion and disunity, not only among sections of these United States but also among people of different races and creeds within the various sections, and among the departments of the Federal Government; and

WHEREAS, we, the members of the Mississippi State Bar, being charged by legislative mandate, as members of the legal profession, with the duty 'to support the Constitution and Laws of this State and of the United States', as well as being urged by a sense of patriotism and loyalty to our Federal Government and our State, feel called upon to reiterate those foundation stones of Government in which we believe and which we are convinced are embodied in our Federal Constitution and also in the Constitutions of the several States; and

WHEREAS, we believe in the intrinsic value of every individual regardless of race, creed or color, and that each is entitled to life, liberty and the pursuit of happiness under due process of law and under equal protection of the law; that equal justice should be meted out to all men under the law, and that it is our duty as lawyers to do our utmost to see that this end is accomplished; that violence should be averted; that the rights of all men should be defended with equal vigor to assure to all their true constitutional rights; and

WHEREAS, we believe that since the opening of the October, 1956, term of the United States Supreme Court, the true intent and purposes of the framers of our Federal Constitution have been circumvented and ignored by the Supreme Court of the United States,

*Editor's Note: This is the complete report of the Committee on Maintenance of Constitutional Rights of the States and of Individuals presented at the Fifty-second Annual Meeting of the Mississippi State Bar Association held at Biloxi, Mississippi, June 28-29, 1957.

especially in its construction of the First, Fifth, Tenth and Fourteenth Amendments to said Constitution, in that said Court no longer seems to heed or give credence to the fact that the several States, in ratifying the Federal Constitution, reserved to themselves all powers and authority not specifically relinquished to the National Government; but instead, the Supreme Court of the United States, through legislation by judicial fiat, under the guise of constitutional interpretation, has brought about an ever increasing trespass upon those areas heretofore rightfully held to be within the province of the authority reserved by the States; and

WHEREAS, Chief Justice Charles Evans Hughes gave graphic expression to his fear of encroachment by the Federal Government upon the rights of the States when he said:

> 'I have not yet adequately expressed the more than anxiety I feel at the ever-increasing scope given to the fourteenth amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.'

And since that time, the danger of which Chief Justice Hughes warned has been multiplied countless times so that we find ourselves rapidly approaching the point where State sovereignty is becoming only a hollow shell; and

WHEREAS, it has become increasingly evident that the outcome of litigation affecting States Rights and internal security of the Nation before the highest Court of this land can no longer be anticipated by application of the doctrine of stare decisis, we reaffirm our position as being in accordance with the belief of Judge Thomas M. Cooley, as stated in his great work on *Constitutional Limitations,* 8th Ed. Vol. 1 pp. 123, 124, that "A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable . . . It is with special reference to varying moods of public opinion, and with a view of putting the fundamentals of government beyond their control, that these instruments are framed; . . . (and) a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty . . . . What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require."

WHEREAS, we believe that recent opinions of the Supreme Court of the United States, purporting to draw the dividing line between National and State sovereignty within the concept of the Federal Constitution, trespass upon rights of the respective States; and

WHEREAS, nevertheless, as lawyers, we do respect the Court as an institution, but reaffirm our right and duty to legitimately and constructively criticize the members of the Court and their opinions; and

WHEREAS, among the illustrations of the breadth, depth and scope, and indicative of the trend of such usurpations of power by the United States Supreme Court, with the States and prosecutions affected, are:

The State of Kansas, in *Walker v. City of Hutchinson,* 1 L. Ed. (2d) 178, decided December 10, 1956, was denied the right to determine, through its state statutes which were approved by the Kansas Supreme Court, the sufficiency of notice by publication in a real property condemnation suit, as violative of the Fourteenth Amendment to the Federal Constitution.

The State of Arkansas, in *Miller, Inc. v. State of Arkansas,* 1 L. Ed. (2d) 231, decided December 17, 1956, was denied the right, through its state statutes which were approved by the Arkansas Supreme Court, to require a contractor who bid on a federal project in Arkansas to comply with Arkansas contractor licensing requirements, although the Federal Government had not acquired the property upon which the construction work was to be done, on the ground that such would interfere with the application of the Federal Procurement Act.

The State of Michigan, in *Butler v. State of Michigan,* 1 L. Ed. (2d) 412, decided February 25, 1957, was denied the right through its state statute, approved by the Michigan Supreme Court, to determine what was and to prohibit the possession and disposition of obscene literature on the ground that it violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

The State of Utah, in *Guss v. Utah Labor Relations Board,* 1 L. Ed. (2d) 601, decided March 25, 1957, was denied the right, through its Labor Relations Board, to enjoin unfair labor practices prohibited by the National Labor Relations Act even though the National Labor Relations Board declined to entertain the Union's complaint, because the Federal act pre-empted this field in the absence of the National Labor Relations Board ceding jurisdiction to state agencies.

The State of Ohio, in *Amalgamated Meat Cutters and Butcher Workmen, etc. v. Fairlawn Meats, Inc.,* 1 L. Ed. (2d) 613, decided March 25, 1957, was denied the right, through State courts, to restrain a labor union, not representing a majority of employees, seeking to compel an employer engaged in interstate commerce to agree to union

shop contract, because the Federal Act pre-empted any state action even though National Labor Relations Board obviously would decline jurisdiction.

The State of California, in *San Diego Building Trades Council v. Garmon,* 1 L. Ed. (2d) 618, decided March 25, 1957, was denied through its courts power to enjoin unions on the same ground of pre-emption by the Federal Act, even though the National Labor Relations Board declined to entertain a petition for relief.

Although dealing with a procedural matter under Rule 58, dealing with the finality of judgments of the Court, the United States Supreme Court, speaking per curiam, in *United States of America v. Ohio Power Company,* 1 L. Ed. (2d) 683, held where a taxpayer had won a tax recovery lawsuit by the court's denial of certiorari on October 17, 1955, and the denial of two government petitions for a rehearing on December 5, 1955, and May 28, 1956, did on June 11, 1956, sua sponte, vacate its own order of December 5, 1955, and both denials of rehearing, and reversed itself so as to make the taxpayer lose that which he had won more than a year and a half previously, and as to which Justices Harlan, Frankfurter and Burton were disturbed to the point of dissenting, by separate opinions, saying the action of the majority to be a departure from sound procedure and ' . . . unsettling to lawyers and litigants and more disturbing to their confidence in the even handedness of the Court's processes than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed by this Court.'

The State of New Mexico, in *Schware v. Board of Bar Examiners of the State of New Mexico,* 1 L. Ed. (2d) 796, decided May 6, 1957, acting through its Bar examiners, whose action was approved by the New Mexico Supreme Court, was denied the right to exclude appellant from the State Bar examination on the ground, among others, of past membership in the Communist Party because the Court said that such would be a violation of the due process clause of the fourteenth Amendment to the Federal Constitution.

The State of California, in *Konigsberg v. State Bar of California,* 1 L. Ed. (2d) 810, decided May 6, 1957, was denied the right, through its Bar Examiners, whose action was approved by the California Supreme Court, to deny appellant permission to practice law in California because of his refusal to answer questions as to his present and past membership in the Communist Party because, according to the United States Supreme Court, such would violate the due process clause of the Fourteenth Amendment to the Federal Constitution. The majority opinion so offended Justices Clark and Harlan that dissenting they said, among other things: 'But what the Court has really done,

I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.'

The property rights of Stephen Girard have now been violated by the Court. This decision is a sequel to the segregation cases, which involve merely a phase of deprivation of States Rights, originating with *Brown v. Board of Education,* 98 L. Ed. 873, and 99 L. Ed. 1083, in which the Court departed from legal precedent upon the separation of the races and the doctrine of separate but equal facilities, and during the October 1956 term of the Court, now concluding, continues to usurp State regulation of educational and recreational facilities, and intrastate transportation. This trend culminated in the Girard College case, *Commonwealth of Pennsylvania and City of Philadelphia v. Board of Directors of the City Trust of the City of Philadelphia,* 1 L. Ed. (2nd), 792, decided April 29, 1957. Girard by his will chose to endow with his own money a college to admit 'as many poor white male orphans between the ages of six and ten years as the said income will be adequate to maintain', and of which will the City of Philadelphia was named as trustee. The administering board of directors of the City of Philadelphia, following the dictates of the will, refused to admit two negroes. This action was approved by the Orphans Court of Philadelphia and the Supreme Court of Pennsylvania, but the United States Supreme Court avoided the direction of the donor and held such refusal of admission to be discrimination under the Fourteenth Amendment to the Federal Constitution on the theory that the Board which operates Girard College is an agency of the State of Pennsylvania and, therefore, their action constituted state action.

The United States Government and its Courts in *Curcia v. United States of America,* decided June 10, 1957, not yet officially reported, were denied the right to hold in contempt the Secretary-Treasurer of the International Brotherhood of Teamsters for a refusal predicated upon the Fifth Amendment to answer a question as to the whereabouts of the books and records of the Union he had been ordered to produce and which inquiry arose when the federal grand jury of the Southern District of New York was investigating racketeering in the garment and trucking industries in New York City.

The United States Government in Communist cases, styled *Yates v. United States of America,* Nos. 6, 7, 8, decided June 17, 1957, not yet officially reported, totally lost its case to secure affirmance of the lower court conviction in 1952 on a charge of conspiring to overthrow the United States Government against Henry Steinberg, the party's legislative director for Los Angeles County; Rose Chernin Kusnitz, party organizer in New York and later in Los Angeles; Frank Spector,

Los Angeles organizer; Al Richmond, editor of the *Daily People's World,* and Philip Marshall Connelly, the *World's* Los Angeles editor, all of whom were freed of said charges instead of reversing and remanding for further action by the trial Court as was the Supreme Court's decision regarding the nine other defendants involved, and which acquital was recognized as the first instance of its kind in the entire history of the Court according to Justice Clark who, in his dissent, said among other things:

> 'In any event this Court should not acquit anyone here. In its long history I find no case in which an acquittal has been ordered by this Court solely on the facts. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges.'

The United States Congress, in *United States v. Watkins,* decided June 17, 1957, was denied the right to require Watkins as a witness before its Committee to answer questions unless the Committee first established the pertinency of the question and specified the purpose thereof, and the Court determined abrupt limits upon the authority of Congressional Committees, and freed Watkins of contempt proceedings theretofore brought because of his refusal to name persons he had known in the Communist movement, and Justice Clark dissenting says, among other things: 'The majority has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations. It has never been so.'

With regard to the impairment of constitutional rights by legislation introduced in the Congress, we feel that reference should be made to the pending so-called 'Civil Rights' bill which has passed the House of Representatives and is now before the Senate. Under the guise of preserving equity jurisdiction, this bill would give to a single judge the right to conduct a criminal hearing where he would be both judge and jury. Mr. Justice Felix Frankfurter condemned such invasion of the constitutional right of an individual to a jury trial in his book entitled *The Labor Injunction* wherein he clearly warned against this device, saying:

> 'The heart of the problem is the power, for all practical purposes, of a single judge to issue orders, to interpret them, to declare disobedience and then to sentence.'

He said the injunction 'employs the most powerful resources of the law on one side of a bitter social struggle.'

Justice Frankfurter opined that 'trial by jury in contempt proceedings is an innovation in modern practice, but is a return to what is old in the history of English law.'

And he said that 'since a charge of criminal contempt is essentially an accusation of crime, all the constitutional safeguards available to the

accused in a criminal trial should be extended to prosecutions for such contempt.'

The effect of this proposed legislation would tend to create a central police force which has been proved throughout history to be a forerunner to the abolition of human rights. Such concentration of power in the Federal Government was warned against by the late Justice Robert H. Jackson before he died in 1954. He said:

> "If the Department of Justice must posecute local officials, the FBI must investigate them, and no local agency which is subject to federal investigation, inspection, and discipline is a free agency. I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police. At his trial Herman Goering, with great candor, related the steps by which the Nazi party obtained complete domination of Germany, and one of the first was the establishment of the supremacy of the national over the local police authorities. So it was in Russia, and so it has been in every totalitarian state. All that is necessary is to have a national police competent to investigate all manner of offenses, and then, in the parlance of the street, it will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies. Even those who are supposed to supervise it are likely to fear it. I believe that the safeguard of our liberty lies in limiting any national policing or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. The fact that we may hove confidence in the administration of a federal investigative agency under its existing heads does not mean that it may not revert again to the days when the Department of Justice was headed by men to whom the investigatory power was a weapon to be used for their own purposes."

NOW, THEREFORE, BE IT RESOLVED, that we, the members of the Mississippi State Bar, in convention assembled, having stated our beliefs in the premises, do hereby:

1. Commend all Congressmen from Mississippi and the other states who have worked unceasingly to preserve the Constitutional rights of the States, of all individuals, and the internal security of this Nation, and urge them to continue this struggle which we believe must be won if our American Heritage is to be perpetuated. We especially urge them to continue in their efforts to defeat the Civil Rights recently passed by the House of Representatives and now being considered by the Senate.

2. Commend the Members of the Mississippi Legislature, the Governor of Mississippi, all other state officials, and all individuals joining therein with them for their untiring efforts directed toward the maintenance of State sovereignty in every phase thereof, and urge

them and members of Congress from Mississippi to exert their every effort to bring about a termination and reversal of the usurpation hereinabove recognized.

3. Urge the Congress to enact corrective legislation to restrict judicial violation of the Constitution.

4. We pledge ourselves to maintain eternal vigilance in the preservation of individual and States' Rights and urge them to keep abreast of the new developments in these matters and to be prepared to acquaint the general public with the newest trends at every available opportunity.

5. Urge the members of the Bars of the other forty-seven States to bind themselves together and lend their efforts to curb usurpation by the United States Supreme Court of the rights of the sovereign states, and we further urge the Bars of the other states to give their thoughtful consideration to the idea of forming within their respective Bar Associations a committee comparable in purpose to the 'Committee on Maintenance of Constitutional Rights of the States and of Individuals' of the Mississippi State Bar in order that we may share ideas and work together for the common good of all.

BE IT FURTHER RESOLVED, that copies of the foregoing resolutions be sent to the members of Congress from Mississippi; to the Attorney General of each State; to the President of the American Bar Association; to the Editor of the *American Bar Association Journal,* and to the President of all State Bar Associations."

REVIEWING A REVIEW

In the December, 1957, issue of the *Mississippi Law Journal* Prof. William P. Murphy, of the University Law Faculty, uses what purports to be a review of James J. Kilpatrick's book, *The Sovereign States,* as a vehicle for an all-out attack on the entire concept of the dual form of our Federal government.

The Constitution of this Nation was, in a large measure, created out of compromises and based upon a system of checks and balances. The Founding Fathers of our country realized that only a strong central government could successfully cope with foreign powers, regulate commerce with foreign nations and among the several states, and conduct certain nation-wide governmental services such as the issuance of currency and the establishment of post offices and post roads. On the other hand, they had good reason to fear tyranny in a powerful centralized state, and were determined to keep local self government close to the people.

The tenth amendment, clearly reserving to the states powers not granted to the Federal government, was written into the Constitution as an insurance policy that the central government would never seize control over the day-to-day affairs of the peoples of the several states. This insurance is of paramount importance to all sections of the country, and the South today is relying upon it as one of the means for the preservation of its way of life. The Bar of Mississippi does not believe that such reliance rests upon what Professor Murphy terms "extremist conceptions of the American system of government, conceptions which were untenable when first advanced and which today are simply ridiculous."

The tenth amendment has been the subject of debate from its inception—a debate revolving around questions of strict or liberal construction; express or implied powers.

Chief Justice Marshall, in *McCulloch v. Maryland,* resolved the question of implied powers by holding that the Congress has the implied power to use all means necessary and proper in the execution of its express powers. This construction stood the test of time for almost a hundred and fifty years until recent day prophets on the political scene began tinkering with the foundations of the greatest government that mankind has yet constructed.

Granting the widest conceivable latitude in the application of the implied powers doctrine, there is still no basis, in history, logic or jurisprudence, for nullifying the tenth amendment by the devious expediency of construing it out of existence. This amendment specifically reserves to the states and to the people all powers not delegated to the Federal government. This in itself is a clear implication that certain

powers were withheld, from which it logically follows that, as to such powers, the states, and not the central government, are supreme so long as the tenth amendment stands unrepealed.

Nevertheless, it is now contended that since the word "express" was omitted in the limitation on the grant of powers the gates were thereby thrown wide open for the central government to take over supreme and exclusive control, uninhibited by any limitation whatever. In other words, the term "implied powers" is to be expanded to include all powers, irrespective of whether granted or reserved. Such a contention would spell the death of the Constitution of the United States of America and mark the entry upon the American scene of one supreme, all powerful government in Washington.

If and when all this should come to pass, the prophecy of the historian Macauley will have been fulfilled, wherein he told the American people more than a hundred years ago:

> "Your Republic will be pillaged and ravaged in the twentieth century, just as the Roman Empire was in the fifth century, with this difference, that the devastators of the Roman Empire came from abroad, while your barbarians will be the people of your own country and the product of your own instructions."

It is to be devoutly hoped that the people of this great country will never let such a prophesy come true.

Will E. Ward
Attorney at Law
Starkville, Mississippi

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RECENT DECISIONS

Easements—Abandonment By Misuse

The grantees of a parcel of land with "an easement of Right of Way for ingress and egress" over plaintiff's dead-end road, extended the road to its junction with a public street and dedicated the extension to the town, which largely increased the user of the road. The plaintiff brought an injunctive and a declaratory action to determine the defendants' rights in the servient roadway. Alhough it was contended that lesser relief should have been awarded, the lower court declared the appurtenant easement "abandoned by misuse" and the defendants appealed. Held: Affirmed. By their own acts the defendants have made it impossible for either themselves or the plaintiff to confine the use of the easement to the owners of the dominant estate only. *Crimmins v. Gould,* 308 P. 2d 786 (Cal. 1957).

Because the excessive user of an easement may be at once an injury to the servient tenement and the basis for a new prescriptive right, the law affords an immediate redress. An easement may be acquired by grant or prescription the same as other interests in realty.[1] It may be lost, also, by these and other well-defined means.[2] Some text-writers have concluded that one means of extinguishment, where authorized and unauthorized user become inseparable by reason of a very radical change in the dominant tenement, is forfeiture by misuse.[3] This conclusion appears to have been derived by analogy from early English cases dealing with easements of light.[4] In those cases, where a dominant owner enlarged ancient lights, the servient owner was permitted to obstruct all the light because such obstruction was his only means of preventing the enlargement of the easement. Although the courts are in agreement that an increased burden upon a servient tenement will not justify a forfeiture if the increase can be severed,[5] the question

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[1]Gulf, Mobile & Ohio R. R. Co. v. Tallahatchie Drainage Dist. of Union County, 218 Miss. 583, 67 So.2d 528 (1953). The law does not favor easements by implication, but they may be created, depending on the intent of the parties.

[2]See 3 Tiffany, The Law of Real Property § 817-828 (3rd ed. 1939).

[3]Id. § 821, citing Goddard, Easements 547 (6th ed.); Gale, Easements 521, 528 (8th ed.).

[4]"A party may so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the right altogether . . . ." Garritt v. Sharp, 3 Ad. & E. 325, 111 Eng. Rep. 437 (1835); Renshaw v. Bean, 18 Q. B. 112, 118 Eng. Rep. 42 (1852); Hutchinson v. Copestake, 141 Eng. Rep. 1103 (1860). The principle announced in the cited cases was overruled in Tapling v. Jones, 144 Eng. Rep. 1067 (1865) by reason of the proclamation of the Prescription Act, 2 & 3 W. 4, c. 71, (1832) but it seems to have been retained in Calif. Civil Code Ann. § 811 (3).

[5]O'Banion v. Cunningham, 168 Ky. 322, 182 S.W. 185 (1916); Clark v. Reynolds, 125 Va. 626, 100 S.E. 468 (1919); De la Cuesta v. Bazzi, 47 Cal. App. 2d 661, 118 P.2d 909 (1941); Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc., 86 App. D. C. 58, 179 F.2d 64, 16 A.L.R.2d 602 (1949); Perry v. Wiley, 285 Ill. 25, 120 N.E. 455 (1918); Barth v. Pittsburgh, C. C. & St. L. R. Co., 175 Ind. 554, 93 N.E. 535 (1911); Masonic Temple Asso. v. Harris, 79 Me. 250, 9 A. 737 (1887); McTravish v. Carrol, 13 Md. 429 (1859); Mendell v. Delano, 7 Met. 176 (Mass. 1843); Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N.W. 136 (1895); Kouwenhoven v. New York Rapid Transit Corp., 256 App. Div. 253, 9 N.Y.S. 2d 629 (1939); Seastrunk v. Walker, 156 S.W. 996 (Tex. Civ. App. 1941); Deavitt v. Washington County, 75 Vt. 156, 53 A. 563 (1903); Sharp v. Kline, 82 W.Va. 13, 95 S.E. 441 (1918).

as to the surcharge and the possibility of it being severed is largely one of fact.[6] The courts do, of course, require that a granted use be as unoppressive as possible.[7] As the allowance of a surcharge depends largely upon its reasonableness, the necessity of the use is often an important factor to be considered.[8] In the principal case, the court found as a matter of fact that the excessive use was neither necessary nor reasonable. In granting the remedy that it did, in order to give the servient owner the protection to which he was entitled, the court carried out the apparent intent of the California statute which declares that a servitude is extinguished by "the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature and exercise."[9]

The scarcity of cases in which courts have seen fit to declare easements abandoned by misuse makes such cases noteworthy. Courts do not favor the forfeiture of easements[10] and appear to be in accord in considering that the mere misuse or excessive use thereof does not ordinarily constitute a forfeiture,[11] the view being that an injunction is the proper remedy.[12] However, as pointed out in the principal case, "cases holding that injunctive relief is a proper remedy of the servient owner for unauthorized or excessive uses of an easement do not hold that an injunction is the exclusive remedy."[13] After finding that an injunction would not afford an adequate remedy for the injured plaintiff, it appears that the application of the principle that "where there is a wrong there is a remedy" compelled the court to declare the easement abandoned by misuse.

Jack D. Warren

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[6]Welsh v. Taylor, 134 N.Y. 450, 31 N.E. 896 (1892); Rowell v. Doggert, 143 Mass. 483, 10 N.E. 182 (1887); Unverzagt v. Miller, 306 Mich. 260, 10 N.W.2d 849 (1943); Williams v. Northern Natural Gas Co., 136 F. Supp. 514 (N.D. Iowa, 1955).

[7]Anzalone v. Metropolitan Dist. Comm., 257 Mass. 32, 153 N.E. 325 (1926); Henrie v. Johnson, 28 W.Va. 190 (1886).

[8]Morrison v. King, 62 Ill. 30 (1871).

[9]Calif. Civil Code Ann. § 811 (3). The law regarding the extinguishment of easements by excessive user is almost wholly a development of the courts. An examination of 39 state codes revealed that only two states so provide by statute. See Calif. Civil Code Ann. § 811 and 60 Okl. St. Ann., § 59.

[10]Luttropp v. Kilborn, 186 Wis. 217, 202 N.W. 368 (1925); Ritter-Walker Co. v. Bell, 46 N.M. 125, 123 P.2d 381 (1942); Paul v. Blakely, 243 Iowa 355, 51 N.W. 2d 405 (1952); Roediger v. Cullen, 26 Wash.2d 690, 175 P.2d 669 (1946), (to the gaining of easements by adverse possession).

[11]See note 5 supra; see also, Restatement, Property § 504, comment e, illustration 9: "A has an easement of way permitting him to drive vehicles for family use across Whiteacre. A goes into the trucking business, finds the way convenient, and begins operating a large number of trucks over it. Though this use is excessive he does not by making it lose the right to use the way for the purpose for which it was created."

[12]See note 5 supra.

[13]Knotts v. Summit Park Co., 146 Md. 234, 126 A. 280 (1924); Norris v. Hoffman, 133 App. Div. 596, 118 N.Y.S. 156 (1909), aff'd mem. 197 N.Y. 578, 91 N.E. 1118 (1910); O'Banion v. Cunningham, 168 Ky. 322, 182 S.W. 185 (1916); Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc., 86 App. D.C. 58, 179 F.2d 64, 16 A.L.R.2d 602 Norfleet v. Cromwell, 70 N.C. 643, 16 Am. Rep. 787 (1874), (easement lost or suspended during the continuance of misuser).

LIBEL AND SLANDER—ACTIONABLE IMPUTATION BY PROVINCIALISM NOT ORDINARILY DEFAMATORY

The defendant told the plaintiff, in the presence of divers persons, "You owe me money for newspapers and you have snaked on me." The persons hearing this word, "snaked", recognized that the defendant meant that the plaintiff was guilty of the crime of cheating and swindling. HELD: Affirmed. (1) An actionable imputation may be made by the use of cant or slang words or provincialisms which, according to their ordinary meaning, are not defamatory. (2) The quoted language was ambiguous and therefore required the aid of innuendo in order to establish its slander. *Blackstock v. Fisher,* 95 Ga. 117, 97 S.E. 2d 322 (1957).

A statement capable of both defamatory and nondefamatory meanings is not actionable if the person to whom it is published does not understand the statement as having the defamatory meaning. This is true even though the publisher might have intended to defame and even though a reasonable recipient would so have understood the publisher.[1] Should the recipient mistakenly but reasonably understand the publication as defamatory, there has been a defamation regardless of the innocent but hidden intent of the publisher.[2]

For most practical purposes, the jury hearing a given case provides the reasonable construction to be placed upon the words spoken,[3] but the jury may not hear evidence of technical meaning if it appears to the court that the subject words were spoken in their popular and ordinary sense.[4]

In Mississippi, words defamatory per se must be susceptible of but one meaning and that must be an opprobrious one.[5] Most slang words are ambiguous and therefore may be no more than actionable per quod. In determining the meaning of such ambiguous words, all the circumstances surrounding their publication, and known to the recipient, must be considered;[6] these circumstances may not enlarge the meaning of the words spoken but may only serve to explain them.[7] At least one jurisdiction has taken judicial notice, not requiring proof, of the defamatory meaning of a frequently used slang word, even though this word was capable of both defamatory and nondefamatory definition.[8] Several jurisdictions, including Mississippi, have taken like

[1]Conroy v. Breland, 185 Miss. 787, 189 So. 814 (1939); Taylor v. Standard Oil Co., 184 Miss. 392, 186 So. 294 (1939).

[2]Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So.2d 572 (1946); Conroy v. Breland, 185 Miss. 787, 189 So. 814 (1939); Taylor v. Standard Oil Co., 184 Miss. 392, 186 So. 294 (1939); Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929); Rodgers v. Kline, 56 Miss. 808 (1879).

[3]Miss. Code Ann. § 1059 (1942); Krebbs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955); Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 25 So.2d 572 (1946); Jarnigan v. Fleming, 43 Miss. 710 (1870).

[4]Rodgers v. Kline, 56 Miss. 808 (1879); Jarnigan v. Fleming, 43 Miss. 710 (1870).

[5]Manasco v. Wallace, 216 Miss. 614, 63 So.2d 91 (1953).

[6]Conroy v. Breland, 185 Miss. 787, 189 So. 814 (1939); Taylor v. Standard Oil Co., 184 Miss. 392, 186 So. 294 (1939); Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929).

[7]Restatement, Torts § 563 (1938).

[8]The court notice of the meaning the word "sack" had acquired in newspaper literature, when used in connection with election corruption funds. Edwards v. San Jose Printing, 99 Cal. 431, 34 P. 128 (1893).

notice of provincialisms capable of but one meaning, and that a defamatory one.[9]

Although provincialisms are widely used in Mississippi, this State has reported few cases concerned with their use;[10] a limited number of them have been reported in other jurisdictions.[11] These cases are to be treated no differently from those involving defamation by ordinary words for, in any defamation case, it is the reasonable effect of words spoken, and not form, which creates the meaning. The same general rules of word construction that govern actions for defamation in Mississippi courts have been applied to the noted Georgia case. It is submitted that by so doing Georgia has rendered a correct decision which is, and should continue to be, pari ratione with those of Mississippi.

Robert P. Crutcher

Municipal Law—Conflict Between Ordinance And State Law

The defendant sold beer to a juvenile sixteen years of age. The City of Lafayette charged the defendant with violating a city ordinance which prohibited the sale of beer to all persons under the age of twenty-one.[1] In the City Court of Lafayette, the defendant filed a motion to quash the indictment on the grounds that the ordinance

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[9]"Iowa Beecher" as applied to a clergyman. Bailey v. Kalamazoo Publishing Co., 40 Mich. 251 (1874); Interstate Co. v. Jolly, 156 Miss. 199, 125 So. 406 (1930); ". . . the word 'bitch' . . . as applied to woman, means a lewd or sensual woman." Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929); ". . . dry check" imputes a violation of criminal law. Elder v. Evatt, 154 S.W. 2d 684 (Tex. 1941); "Tweed Dynasty in New York Democratic Politics" denotes corrupt political practices. Krause v. Sentinel Co., 60 Wis. 425, 19 N.W. 384 (1884).

[10]Houston v. Oppenheim, 166 Miss. 619, 145 So. 339 (1933); Intersate Co. v. Jolly, 156 Miss. 199, 125 So. 406 (1930); Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929).

[11]". . . woman about town" may impute immorality. Peinhardt v. West, 217 Ala. 12, 115 So. 88 (1927); ". . . black market" imputes improper business conduct. Proto v. Bridgeport Herald Corp., 136 Conn. 557, 72 A.2d 820 (1950); ". . . stoop" may describe a person who picks up race track tickets off the ground and attempts to cash them as his own. Campbell v. Jacksonville Kennel Club, 66 So.2d 495 (Fla. 1953); "Pony Club" may impute horse thievery. Cooper v. Perry, Dudl. 247 (Ga. 1833); ". . . in a fix" may be used to denote the pregnancy of a woman. Acker v. McCullough, 50 Ind. 447 (1875); ". . . ornrier" may be used to denote that a woman is unchaste. Wilmer v. Allbaugh, 78 Iowa 79, 42 N.W. 587 (1889); ". . . quack" may denote professional incompetency. Brinkley v. Fishbein, 134 Kan. 833, 8 P.2d 318 (1932); ". . . clap" is a vulgarism denoting venereal disease. Sally v. Brown, 220 Ky. 576, 295 S.W. 890 (1927); ". . . rift in lute" may indicate breach in marital relations. Lyman v. New England Newspaper Pub. Co., 286 Mass. 258, 190 N.E. 542 (1934); ". . . goose-horn" may be used to denote a brothel. Dyer v. Morris, 4 Mo. 214 (1835); "Quisling" imputes treason. Sanctuary v. Thackrey, 189 Misc. 724, 72 N.Y.S.2d 104 (1947); ". . . make the tray of biscuit roar" may impute biscuit stealing. Briggs v. Byrd, 33 N.C. 353 (1880); ". . . bleeding", "hush money" and "trimming" may charge extortion. Mannix v. Portland Telegram, 144 Or. 172, 23 P.2d 138 (1933); "Mata Hari of the parking meters" may denote bribery. Morgan v. Bulletin Co., 369 Pa. 349, 85 A.2d 869 (1952); ". . . humbug" may denote deceit. Ramharter v. Olsen, 26 S.D. 499, 128 N.W. 806 (1910).

[1]"That it shall be unlawful for any dealer, manufacturer, wholesale dealer, jobber or retail dealer to sell any of said liquors or beverages to any person below the age of 21 years . . ." Ord. No. 316, sec. 13, City of Lafayette.

was an attempted usurpation of a field of legislation already occupied by the State. The trial judge held that the ordinance contravened the limitation of the State statute which set the age limit at eighteen.[2] HELD: Reversed. The ordinance of the City of Lafayette is a regulation appropriate to the necessities of the locality and it is not in itself unreasonable. *City of Lafayette v. Elias,* 95 So.2d 281 (La. 1957).

As a basic premise it may be stated that a municipal ordinance which conflicts with state law is invalid. It is almost universal that a municipality cannot permit or license an activity which is banned by state law.[3] Conversely, most jurisdictions hold that a city cannot prohibit what the state has permitted.[4] However, it must be noted that the great majority of state courts permit complementary regulaions which are stricter than, or in addition to, the state law, and this is so even though, in effect, the additional regulations often prohibit what the state permits.[5] The question seems to be whether the municipal regulation is in conformity with the plan or spirit of the state statute.[6] Even in the absence of any conflict between state and local law, there are many decisions holding that a statute may fully occupy a particular field so that any municipal ordinance imposing additional regulation in that field is void.[7] Most courts generally agree that to determine whether the field has been occupied the problem is one of ascertaining the legislative intent.[8] But since the legislative intent is often ambiguous, courts balance the factual factors and attribute the result to the legislature. In Mississippi it has been held that a municipality may not pass an ordinance prohibiting the operation of any business which is allowed under the laws of the state, unless that business is so con-

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[2]"No person holding a retail dealer's permit and no servant, agent, or employee of the permittee shall do any of the following acts . . . (1) Sell or serve beverages of low alcoholic content to any person under the age of eighteen years." LSA-Rev. Stat. 26:285.

[3]Kraus v. Cleveland, 135 Ohio St. 43, 19 N.E. 2d 159 (1939) (coin machines); Jackson v. Sylacauga, 25 Ala. App. 244, 144 So. 125 (1932) (chiropractor); Zuccarro v. State, 197 S. W. 982 (Tex. Crim. App. 1917) (Sunday movies); Armitage v. Camden, 135 A. 661 (N. J. 1927) (Sunday baseball); State ex rel Sergi v. Youngstown, 68 Ohio App. 254 (1941) (gambling); Commonwealth v. Surridge, 265 Mass. 425, 164 N. E. 480 (1929) (obstructing highway).

[4]State ex rel Knese v. Kinsey, 314 Mo. 80, 286 S. W. 437 (1926) (sale of milk); Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N. E. 158 (1929) (traffic regulation); State ex rel Cozart v. Carrar, 133 Ohio St. 50, 11 N. E. 2d 245 (1937) (liquor); Kress v. City of New York, 283 N. Y. 455, 27 N. E. 2d 431 (1940) (sale of frozen food); Boaz v. Jenkins, 32 Ala. App. 299, 25 So. 2d 344 (1946) (gambling); National Amusement Co. v. Johnson, 270 Mich. 613, 259 N. W. 342 (1935) (endurance contests); Yakimor v. Gorham, 200 Wash. 564, 94 P. 2d 180 (1939) (picketing).

[5]Ex parte McClain, 134 Cal. 110, 66 P. 69 (1901) (lottery tickets); People v. Commons, 64 Cal. App. 2d 925, 148 P. 2d 724 (1944) (dangerous weapons); Fox v. Racine, 225 Wis. 542, 275 N. W. 513 (1937) (endurance contests); Smith v. Notasulga, 257 Ala. 382, 59 So. 2d 674 (1952) (liquor tax); Sims v. Martin, 33 Ga. 486, 126 S. E. 872 (1925) (speed limit); Elsner Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479 (1912) (sale of firearms).

[6]Ex parte Johnson, 20 Okla. Crim. 66, 201 P. 533 (1921).

[7]Shelton v. Relton, 111 Conn. St. 50, 11 N. E. 2d 245 (1937) (milk regulation); Commonwealth v. Wolbarst, 319 Mass. 291, 65 N. E. 2d 552 (1946) (pin ball machines); Richards v. Pontiac, 305 Mich. 666, 9 N. W. 2d 885 (1943) (house trailers); Alexandria v. La. Combe, 220 La. 618, 57 So. 2d 606 (1952) (gambling).

[8]Shaw v. Norfolk, 167 Va. 346, 189 S. E. 335 (1937).

ducted as to become a nuisance.[9] The author found no reported case in Mississippi where the Supreme Court has passed on the question of occupation of the field.

The cases in this area of the law seem to rest on a balancing of interests. On the one hand, there is the interest of the municipality in regulating the health and moral standards of the community, and on the other, the interest of the state in maintaining its sphere of statutory power. The result is that the court in any jurisdiction might allow an ordinance to stand on the grounds that it is a complementary regulation and in the next case, with an analogous set of facts, hold that the ordinance is void because it contravenes state power.[10] Where there is an application of the "occupation of the field" doctrine it is often difficult to capture the legislative intent; for this reason text writers in the field seem to feel the theory should be discarded.[11] Even though, in the present case, the ordinance and the statute conflict on their face,[12] the court seemed to base its decision on public policy.[13] It is submitted that when the Louisiana Legislature passe dthe statute setting the age limit on beer sales,[14] it was cognizant of the fact that several cities in the state had institutions of higher learning and had it been their intention for municipalities to change the age limit, this would have been so stated. By the present decision the court has deprived the state of a portion of its statutory power and in so doing the statewide uniform minimum age limit has been upset.

Kenneth Perry

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[9]". . . powers delegated by the Legislature to municipalities are intended to be exercised in conformity to, and consistent with, the general laws of the State, and are to be construed most strongly against a power or right claimed but not clearly given, and an ordinance prohibiting a properly conducted lawful business, the subject of a license tax, is void." Crittenden v. Booneville, 92 Miss. 277, 45 So. 723 (1907); Johnson v. Philadelphia, 94 Miss. 34, 47 So. 526 (1908); Desporte v. Biloxi, 136 Miss. 542, 100 So. 387 (1924); Dart v .Gulfport, 147 Miss. 534, 113 So. 441 (1927); King v. Louisville, 207 Miss. 612, 42 So. 2d 813 (1949).

[10]Compare Trimble v. Topeka, 141 Kan. 111, 75 P. 2d 241 (1938), with Dorossom v. Atchinson, 155 Kan. 255, 124 P. 2d 475 (1942).

[11]Antieau, "The Powers of Municipal Corporations," 16 Mo. L.R. 118, 126 (1951); 1 Antieau, Municipal Corporation Law 291 (1955).

[12]See notes 1 and 2 supra.

[13]"The City of Lafayette has an institution of higher learning within its geographical limits. Thousands of boys and girls from within and without the State are attracted to this institution each year, in quest of knowledge to prepare for their life's work. When these students are sent to Southwestern Louisiana Institute there becomes imposed upon the City of Lafayette a duty not only to the students but their parents. The majority of young men and women presently enrolled at this institution are below the age of twenty-one years. They arrive free from the influence of their families and churches, and their decisions become their own. They are suddenly thrown together, with naturally different dispositions and character, and there is incumbent upon the City of Lafayette the duty to see that they are not exposed to anything that will affect their health, morals, safety, peace, or good order." Lafayette v. Elias, 95 So. 2d 281 (La. 1957).

[14]See note 2 supra.

MUNICIPAL ORDINANCES — TIME OF CLOSING

The plaintiff, operator of a drive-in restaurant, brought action to enjoin enforcement of a town ordinance requiring all businesses to close at midnight and remain closed until six o'clock in the morning. HELD: Affirmed. The ordinance is unconstitutional as violative of Article 1, Sections 5 and 17, of the Constitution of South Carolina, 1895, providing that no person shall be deprived of property without due process of law, and providing that private property shall not be taken for public use without just compensation. *Painter v. Town of Forest Acres,* 97 S.E.2d 71 (S.C. 1957).[1]

In ruling on the validity of a municipal closing hour ordinance courts determine if the ordinance is unreasonable. If it is found to be so, then it is a violation of due process and, therefore, unconstitutional. While this judicial formula appears uncomplicated at first glance, the situation is, in fact, confused to the extent that courts are not agreed o nwhat is, or is not, a reasonable regulation. Essentially similar ordinances have been upheld as applied to auctions,[2] barber shops,[3] butcher shops,[4] pawnbrokers, junk dealers, and second-hand dealers,[5] peddlers and hawkers of food produce,[6] soft drink establishments,[7] laundries,[8] billiard halls,[9] and dance halls.[10] On the other hand, ordinances have been held invalid as applied to auctions,[11] barber shops,[12] grocery

[1]The court said: "Property consists not merely in its ownership and possession but in an unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements to that extent destroys the property itself. It must be conceded that the substantial value of the property lies in its use."

[2]Ex parte West, 75 Cal App. 591, 243 P. 55 (1925); Clein v. City of Atlanta, 164 Ga. 529, 139 S.E. 46 (1927); Wagman v. City of Trenton, 102 N.J.L. 492, 134 A. 115 (1926); Biddles v. Enright, 239 N.Y. 354, 146 N.E. 625 (1925); City of Buffalo v. Marion, 13 Misc. 639, 34 N.Y. Supp. 945 (1895).

[3]Feldman v. City of Cincinnati, 20 F. Supp. 531 (S.D. Ohio 1937); Pearce v. Moffatt, 60 Idaho 370, 92 P.2d 146 (1939); Amodio v. Board of Com'rs of Town of West New York, 133 N.J.L. 220, 43 A.2d 889 (1945); Falco v. Atlantic City, 99 N.J.L. 19, 122 A. 610 (1923); Guarino v. City of Niagara Falls, 184 Misc. 57, 50 N.Y.S. 2d 865 (1944); Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1935).

[4]Justesen's Food Stores v. City of Tulare, 43 Cal. App. 2d 616, 111 P.2d 424 (1941); Porter v. City of Water Valley, 70 Miss. 560, 12 So. 828 (1893).

[5]Shurman v. City of Atlanta, 148 Ga. 1, 95 S.E. 698 (1918); Hyman v. Boldrick, 153 Ky. 77, 154 S.W. 369 (1913); City of Butte v. Paltrovich, 30 Mont. 18, 75 P. 521 (1904); Solof v. City of Chattanooga, 180 Tenn. 296, 174 S.W.2d 471 (1943).

[6]Buffalo v. Schleifer, 2 Misc. 216, 21 N.Y. Supp. 913 (1893).

[7]Churchill v. Albany, 65 Ore. 442, 133 P. 632 (1913).

[8]Soon Hing v. Crowley, 113 U.S. 703 (1885); Barbier v. Connolly, 113 U.S. 27 (1885); Ex parte Wong Wing, 167 Cal. 109, 138 P. 695 (1914); Ex parte Moynier, 65 Cal. 33, 2 P. 728 (1884).

[9]Purvis v. City of Ocilla, 149 Ga. 771, 102 S.E. 241 (1920); City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202 (1894); Ex parte Brewer, 68 Tex. Crim. 387, 152 S.W. 1068 (1913).

[10]Mehlos v. City of Milwaukee, 156 Wis. 591, 146 N.W. 882 (1914).

[11]People v. Gibbs, 186 Mich. 127, 152 N.W. 1053 (1915); Webber v. City of Scottsbluff, 141 Neb. 363, 3 N.W.2d 635 (1942); Robinson v. Wood, 119 Misc. 299, 196 N. Y. Supp. 209 (1922); Hayes v. Appleton, 24 Wis. 542 (1869).

[12]McDermott v. City of Seattle, 4 F. Supp. 855 (W.D. Wash. 1933); Ganley v. Claeys, 2 Cal.2d 266, 40 P.2d 817 (1935); City and County of Denver v. Schmid, 98 Colo. 32, 52 P.2d 388 (1935); Miami v. Shell's Super Store, 50 So.2d 883 (Fla. 1951); Chaires v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927); Alexandria v. Hall 171 La. 595, 131 So. 722 (1930); Eanes v. Detroit, 279 Mich. 531, 272 N.W. 896 (1927); Pavlik v. Johannes, 194 Minn. 10, 259 N.W. 537 (1935); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Ernesti v. Grand Island, 125 Neb. 688, 251 N.W. 899 (1933);

stores,[13] general merchandising stores,[14] peddlers,[15] billiard halls,[16] laundries,[17] restaurants,[18] skating rinks,[19] open air markets,[20] lunch wagons,[21] meat markets,[22] movie theaters,[23] clothing stores,[24] barbecue stands,[25] shoe stores,[26] various businesses,[27] and all business establishments.[28] In reaching their decision as to the reasonableness of the ordinance as applied to the businesses enumerated above, courts have devised certain legal formulae by which the result is described. The closing hour ordinances must bear a relationship to the protection of public health,[29] safety,[30] morals,[31] or the general welfare,[32] and must

Oklahoma City v. Johnson, 183 Okla. 430, 82 P.2d 1057 (1938); City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851 (1940); City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943); Kellerman v. City of Philadelphia, 139 Pa. Super. 569, 13 A.2d 84 (1940); City of Huron v. Munson, 67 S.D. 88, 289 N.W. 416 (1939); Salt Lake City v. Revene, 101 Utah 504, 124 P.2d 537 (1942); Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934); State ex rel. Newman v. City of Laramie, 40 Wyo. 74, 275 P. 106 (1929).

[13]Deese v. City of Lodi, 21 Cal. App.2d 631, 69 P.2d 1005 (1937); McCully v. Wichita, 151 Kan. 214, 98 P.2d 192 (1940); Town of McCool v. Blaine, 194 Miss. 221, 11 So.2d 801 (1943); Olds v. Katz, 131 Ohio St. 447, 3 N.E.2d 371 (1936).

[14]Ex parte Harrell, 76 Fla. 4, 79 So. 166 (1918); State v. Ray, 131 N.C. 814, 42 S.E. 960 (1902).

[15]People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939 (1936); City of Buffalo v. Linsman, 113 App. Div. 584, 98 N.Y. Supp. 737 (1906).

[16]State v. Pamperin, 42 Minn. 320, 44 N.W. 251 (1890); Ex parte Perkins, 88 Tex. Crim. 309, 226 S.W. 411 (1920); Ex parte Farley, 65 Tex. Crim. 405, 144 S.W. 530 (1912).

[17]Yee Gee v. City of San Francisco, 235 F. 757 (N.D. Cal. 1916); In re Wong Way, 6 Cal. 2d 779, 58 P.2d 916 (1936); Ex parte Mark, 6 Cal. 2d 516, 58 P.2d 913 (1936); Spann v. Gaither, 152 Md. 1, 136 A. 41 (1927).

[18]City of Jackson v. Murray-Reed-Slone Co., 297 Ky. 1, 178 S.W.2d 847 (1944).

[19]Johnson v. Town of Philadelphia, 94 Miss. 34, 47 So. 526 (1908).

[20]Cowan v. City of Buffalo, 247 App. Div. 591, 288 N.Y. Supp. 239 (1936).

[21]Hart v. Teaneck Tp., 135 N.J.L. 174, 50 A.2d 856 (1947).

[22]Brown v. Seattle, 150 Wash. 203, 272 P. 517 (1928).

[23]City of Harlan v. Scott, 290 Ky. 585, 162 S.W.2d 8 (1942).

[24]Crawford's Clothes v. City of Newark, 131 N.J.L. 97, 35 A.2d 58 (1944).

[25]Fincher v. City of Union, 186 S.C. 323, 196 S.E. 1 (1938).

[26]Abrams v. City of Buffalo, 276 N.Y. 494, 12 N.E.2d 174 (1937).

[27]Chan Sing v. Astoria, 79 Ore. 411, 155 P. 378 (1916).

[28]Goodin v. City of Philadelphia, 222 Miss. 77, 75 So.2d 279 (1954).

[29]Falco v. Atlantic City, 99 N.J.L. 19, 122 A. 610 (1923), in which the court in upholding the ordinance said: "To allow barber shops to remain open to the public at all hours of the night will be regarded as rendering ready and adequate inspection inconvenient or difficult, or even impossible, and consequently detrimental to public health." Contra, Chaires v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927), in which the court said: "If the barber shops are closed at 7 o'clock in the evening and not permitted to open until next morning, there will be a large and numerous class of citizens . . . who cannot avail themselves of the services of barbers."

[30]Barbier v. Connolly, 113 U.S. 27 (1885), in which the court in upholding an ordinance applicable to laundries, said: "It may be a necessary measure of precaution . . . that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the sole judges." Contra, Yee Gee v. City of San Francisco, 235 F. 757 (N.D. Cal. 1916), in which the court said: "The only menace intended to be met by this particular regulation is danger from fires. But to say that to obviate that danger it is reasonably necessary that the hours of labor . . . be curtailed to the narrow limits prescribed . . . is, on the face of it, to state an absurdity."

[31]Wehlos v. City of Milwaukee, 156 Wis. 521, 146 N.W. 882 (1924), in which the court upheld a closing hour ordinance applicable to dance halls because of their tendency to breed disorder, intemperance, and immorality.

[32]Town of McCool v. Blaine, 194 Miss. 221, 11 So.2d 801 (1943), in which the

not be discriminatory in nature.[33] Finally, the ordinance must not result in a deprivation of property rights without due process of law. In its application this would seem to dictate that under the pretense of regulating a business the business attempted to be regulated cannot be destroyed.[34]

It appears then that the principal case is but another in a long line of decisions attempting to establish some fixed guide to settle, in future cases, what is, or is not, a reasonable exercise of the power of regulation. It is submitted that there are no fixed and permanent rules which courts are obligated to apply in determining reasonableness. In *Johnson v. Town of Philadelphia*,[35] the Supreme Court of Mississippi said: "The requirement of reasonableness is so general in its nature that it allows the court to exercise a very efficient control over ordinances without being under the necessity of formulating in each case a principle which would be a guide for other cases." It is submitted that the determination of what is, or is not, a reasonable regulation will be made by the courts on the facts of each particular case. This then appears to be the only true test of the validity of municipal closing hour ordinances.

Robert K. Rushing

PRINCIPAL AND SURETY—LIABILITY OF A SURETY ON A CONTRACT PARTIALLY PERFORMED AT THE TIME OF THE BOND.

A contractor contracted with a subcontractor to perform certain items in a highway contract. The subcontractor performed certain portions of the contract before its surety bond was executed and delivered. The bond embodied the original contract of the subcontractor and contractor as a part thereof. The subcontractor became insolvent and the subcontractor's surety denied liability for the services and labor furnished prior to the bond's execution and delivery. The trial court held for the subcontractor's surety. HELD: Reversed and remanded. The subcontractor's performance bond incorporating the terms of the original contract, requiring the subcontractor to furnish all necessary labor and material, covered a broad contractual obligation

court said: "If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge and thereby give effect to the constitution."

[33]People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939 (1936), in which an ordinance directed against peddlers of newspapers was declared unconstitutional as discriminating in favor of news dealers. But see Clein v. City of Atlanta, 164 Ga. 529, 139 S.E. 46 (1927), in which the court said: "The mayor and general council of the city . . . are clothed with authority under the police power of the city to pass an ordinance regulating the business of auctioneers of jewelry. This power involves the right of classification. While it is perfectly legal to auction jewelry, the city can regulate that business and leave unregulated jewelry dealers who sell at private sale."

[34]Johnson v. Town of Philadelphia, 94 Miss. 34, 47 So. 526 (1908), in which the court said: "The power to regulate is given for a wholesome purpose. It is a defensive power of municipalities, and not a weapon of destruction."

[35]94 Miss. 34, 47 So. 526 (1908).

for all labor and materials furnished both before and after the bond was executed and delivered. *Reed v. Maryland Casualty Co.*, 244 F.2d 857 (5th Cir. 1957).

To discuss cases involving the law of suretyship it is necessary to determine at the start the nature of the surety relation. Here we are concerned with a compensated as distinguished from a gratuitous surety; hence, the doctrine of strictissimi juris is inapplicable in respect to the extent of the surety's liability.[1] As a result, the contract of a surety company is treated by the great majority of courts as though it were an insurance contract.[2] Nevertheless, a compensated surety does not suffer at the hands of the law[3] and the surety contract, itself, is the first fingerpost to its liability.[4] As a general presumption, a surety is not liable for the acts of its principal occuring prior to its bond.[5] Yet, if the contract includes such acts, either by express language or by mutual understanding of the parties, the surety is bound by its contract to include within the scope of its liability the prior acts of its principal.[6] There is also a factual distinction in which the courts indulge; that is, if prior to the bond the principal has made a default, the courts tend to be more lenient in favor of the surety and require an express statement in the bond that the surety assumes liability for the principal's previous

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[1]"The rule of strictissimi juris which operates in favor of gratuitous sureties is inapplicable in a suit against a compensated surety which is not entitled to a strict or technical construction of the contract." Hartford Accident & Indemnity Co. v. Hewes, 190 Miss. 225, 199 So. 93 (1940); Metropolitan Casualty Co. v. Koelling, 57 So.2d 562 (Miss. 1952), modified 58 So.2d 908 (Miss. 1952); U.S.F.&G. Co. v. Citizen's State Bank of Moorhead, 150 Miss. 386, 116 So. 605 (1928); 50 Am.Jur., Suretyship, § 318 (nn. 12, 13 & 14); 12 A.L.R. 382; 94 A.L.R. 876; 128 A.L.R. 938; 63 A.L.R. at 721; 100 A.L.R. at 1452; 119 A.L.R. at 1242; 127 A.L.R. at 11.

[2]U.S.F.&G. Co. v. Citizen's State Bank of Moorhead, 150 Miss. 386, 116 So. 605 (1928); 72 C.J.S., Principal & Surety, § 102 (n.52).

[3]"The surety's contract will not be judicially enlarged by imposing on the surety a class of liability which cannot be fairly said to have been assumed by him under a liberal interpretation of the provisions of the contract." Employer's Assurance Corp. v. Cannon, 173 Okla. 493, 49 P. 2d 103, 102 A.L.R. at 131 (1935); 12 A.L.R. at 387; 94 A.L.R. at 881; Cahn v. Wright, 80 So. 494 (Miss. 1919).

[4]"Liability of a surety company is governed by the express terms of its undertaking." Metropolitan Casualty Co. v. Koelling, 57 So. 2d 562 (Miss. 1952) modified 58 So.2d 908 (Miss. 1952); 72 C. J. S., Principal & Surety, § 91 (nn. 28, 29, 30); 72 C. J.S., Principal & Surety, § 94 (n. 61).

[5]"The general rule is that a surety is not presumed to have meant to become responsible for acts committed before he signed the obligation." Merrinane v. Miller, 157 Mich. 279, 118 N.W. 11, 25 L.R.A. (N.S.) 585 (1909); Employer's Liability Assurance Corp. v. State ex rel Union Trust Co. of Franklin, 110 Ind. App. 86, 34 N.E.2d 936 (1941); Home Indemnity Co. v. State of Missouri, 78 F.2d 391 (8th Cir. 1935); W. J. Jones and Son v. Columbia Casualty Co., 73 F.2d 449 (9th Cir. 1934); American Surety Co. v. Scott, 62 F.2d 961 (10th Cir. 1933); Commonwealth v. Standard Accident Insurance Co. of Detroit, Mich., 105 Pa. Super. 358, 161 A. 895 (1932); Stevenson v. Union Indemnity Co., 160 Tenn. 603, 28 S.W.2d 346 (1930); Sipes v. Anderson Book and News Co., 138 Okla. 180, 280 P. 805 (1929); Schwarze v. New Amsterdam Casualty Co., of Maryland, 136 Okla. 51, 275 P. 660 (1929); Tarentum Realty Co. v. McClure, 230 Pa. 266, 79 A. 551 (1911); 50 Am. Jur., Suretyship, § 34 (n.8).

[6]"It is presumed that bonds are intended to secure losses sustained after, and not before, their execution, but such presumption may be overcome if the facts show that the past as well as future defaults were intended to be covered." Tarentum Realty Co. v. McClure, 230 Pa. 266, 79 A. 551 (1911); see also note 5 supra.

failures, defaults, indebtednesses, etc.[7] However, with reference to the case in which the principal has made no previous default or failure but has performed certain acts not inconsonant with the contract on which the surety later becomes guarantor or indemnitor, it appears that the courts will construe the contract of the surety company most strongly against the surety, and the construction of the contract in favor of the principal will be adopted.[8] The basis of the distinction, if a distinction is made, would seem to lie in the fact that the surety in the first case would be accepting liability on an already past failure and this would tend to show evidence of fraud; therefore, it should be shown that the surety expressly accepted such default and was not defrauded by its principal.[9] In the second case the surety is not accepting a past failure but is merely accepting the prior acts of its principal as a part of the prime contract (the contract between the principal and a third party) on which it intends to be responsible for full and faithful performance; there has been no default at this time and so the element of apparent fraud is non-existent. In the last proposition weight should be given to the fact that the contract of suretyship was included in and inseparable from the prime contract. This is necessary in order that it can be decided whether the bond was a bond for the entire performance by the principal or for performance of certain items which are necessary to the completion of the contract.[10] If the bond was for the entire performance of the principal on the prime contract, then, a fortiori, the partial and prior execution of certain portions of this contract is immaterial to the surety's liability for the performance by the principal of all necessary elements that go into the satisfactory completion of the contract, whether they be performed prior to or after the bond was executed and delivered.[11] The question of whether the surety and principal intended to unite the prime contract with that of the surety contract is, in the final analysis, the main and deciding factor as to the surety's liability.[12]

The dissenting opinion in the noted case, cites three cases[13] as determining the questions involved. It is submitted that all three of

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[7]"Sureties are not liable for defaults occurring before the execution of the bond, unless made so by its terms." Moore v. Hanscom, 103 S.W. 665, judgement modified, 101 Tex. 293, 106 S.W. 876 (1908); see also notes 5 and 6 supra.

[8]"The language of the bond contract is that selected by the company issuing it for a consideration. If ambiguous it must be construed most strongly in favor of the one indemnified." U.S.F. & G. Co. v. Citizen's State Bank of Moorehead, 150 Miss. 386, 116 So. 605, 94 A.L.R. at 878 (1928); Hartford Accident & Indemnity Co. v. Hewes, 190 Miss. 225, 199 So. 93 (1940); 50 Am. Jur., Suretyship, § 318 (n. 5); 72 C. J. S., Principal & Surety, § 102 (nn. 53, 55, 56); 12 A.L.R. at 385.

[9]See note 7 supra.

[10]This case involved a contract to build a garage and the contractor wanted payment for partial performance after refusing to complete the contract. Held: Contract was indivisible. "Various covenants in a contract will be deemed dependent unless the intention of the parties is gathered from the whole instrument so clearly as to make it independent." Clark v. Till, 177 Miss. 891, 172 So. 133 (1937).

[11]See notes 4 and 8 supra.

[12]See note 4 supra.

[13]Alabama Marble Co. v. U.S.F. & G. Co., 146 Miss. 414, 111 So. 573 (1927); Gammill Co. v. Guesnard, 167 Miss. 868, 150 So. 214 (1933); U.S.F. & G. Co. v. Maryland Casualty Co., 191 Miss. 103, 199 So. 278 (1940).

these cases can be distinguished on their facts from this case;[14] and since, in this field, a reliance on the peculiar facts of each case is necessary to reach a good result, these three cases[15] should not be controlling. Here the performance bond incorporated the prime contract and assumed the responsibility for the completion of a bridge—not just certain portions of that bridge but evidently the entire bridge itself. Throughout the bond the prime contract is referred to as the obligation of the surety on the principal's default. The only condition mentioned is that there must be a default by the principal, and, as has been stated,[16] this bond should be construed most favorably toward the principal. The surety could have expressly limited its liability from the date of execution and delivery of the bond; this it did not do. Though there is a general presumption that a surety is not liable for prior acts of the principal,[17] this is only a rebuttable presumption, and in this case it is submitted that it was correctly overruled in favor of the appellants.

Burrell O. McGee

TORTS—LIABILITY OF A MUNICIPAL CORPORATION FOR TORTS COMMITTED BY ITS AGENTS

Appellant by this action seeks to recover from the appellee, a municipal corporation, damages for the death of her husband under the Florida wrongful death statute.[1] Appellant's husband after having been incarcerated in the town jail for excessive intoxication was left completely alone and unattended by the jailer. During the night the

[14]In Alabama Marble Co. v. U.S.F. & G. Co., the Alabama Marble Co. furnished marble to a subcontractor, who, in turn, furnished it to the original contractor. The original contractor paid the subcontractor but the subcontractor failed to pay the Alabama Marble Co., and the Alabama Marble Co. brought an action against the original contractor's surety. HELD Surety not liable. In Gammill Co. v. Guesnard, a subcontractor contracted with "A" Co. to furnish all labor and material for certain tile, etc. "A" Co. contracted with "B" Co. to do all the tile work. "B" Co. defaulted and the tile work was finished by "A" Co. The original contractor then settled with the subcontractor, who settled with "A" Co. Then "B" Co. sent a stop notice to the original contractor and subcontractor claiming a materialman's lien for the tile furnished. Held: "B" Co. could not give an effective stop notice as it was too remote a subcontractor. In U.S.F. & G. Co. v. Maryland Casualty Co., the original contractor contracted with "A" Co. Bond was to be drawn up; but "A" Co. failed to make bond and began construction. The "A" Co. assigned its rights to "B" Co., who obtained the appellee as surety. The original contractor's surety sought to recover the amount it paid for the labor and materials furnished "A" Co. and "B" Co. HELD: The surety only agreed to become responsible for material and labor furnished to its principal, "B" Co. There is no room to imply a contract to pay past-due debts on part of the assignee, "B" Co.

In the first two cases the question involved the surety of the prime contractor, and the material supplied was not directly supplied to the prime contractor but to another, who in turn, supplied it to the prime contractor.

In the last case the labor and material involved were not supplied to the surety's principal but were supplied in part to the principal's assignor and in part to the principal's sublessee.

[15]See note 13 supra.

[16]See note 8 supra.

[17]See note 5 supra.

[1]Fla. Stat. Ann. § 768.01 (1941).

deceased's cell became filled with smoke which resulted in his suffocation. Appellant alleges negligence in leaving the jail unattended and the prisoner unprotected, thereby causing his death. The lower court sustained a motion to dismiss on the ground that a municipal corpora- is not liable for torts committed by police officers. HELD: Reversed. A municipal corporation may be held liable for the torts of police officers under the doctrine of respondeat superior. *Ervine Hargrove v. Town of Coca Beach,* 96 So. 2d 130 (Fla. 1957).

The theory of sovereign immunity came about as a result of the belief that rulers were endowed with their right to rule by God, and found expression in the phrase, "The King can do no wrong."[2] Sovereign immunity was first extended to a municipality in the case of *Russel v. Men of Devon.*[3] Relying upon this decision an early Massachusetts case held that liability might be imposed upon a corporation created for its own benefit but might not be imposed upon a quasi-corporation created for purposes of public policy.[4] In 1842, an American court for the first time recognized the dual nature of American municipalities; that they are on the one hand sovereigns and on the other corporations.[5] In order to give judicial recognition to both these natures the doctrine was introduced into our common law that a municipality might not be held liable for torts committed while acting in its governmental capacity but an action would lie provided the municipality committed the tort while acting in its corporate capacity.[6] In principle the idea expressed in this case has since been recognized almost universally.[7] Mississippi, in 1911, unequivocally accepted this doctrine,[8] and it has since become a well settled principle of our law.[9] But the dividing line between what municipal functions are governmental and what functions are corporate is a thin one; often nebulous and hard to discern.[10] As a result of this, the courts, when faced with identical factual situations have reached conflicting decisions, and it may be said that a state of utter confusion exists.[11] To avoid this confusion, some courts have introduced certain legal niceties which permit them

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[2]Borchard, "Governmental Responsibility in Tort," 36 Yale L.J. 1, 17 (1926).

[3]2 T.R. 667, 100 Eng. Rep. 359 (1788). This decision merely relieved the inhabitants of an unincorporated county from liability for damages resulting from failure to repair a bridge.

[4]Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

[5]Bailey v. Mayor of New York, 3 Hill 531 (N.Y. 1842).

[6]Ibid.

[7]Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760 (1906); Roumbos v. City of Chicago, 332 Ill. 70, 163 N.E. 361 (1928); Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722 (1917); City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911); City of Wichita Falls v. Lewis, 68 S.W. 2d 388 (Tex. Civ. App. 1933); Cf. Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 288 (1911).

[8]City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911).

[9]Bates v. City of McComb, 181 Miss. 336, 179 So. 737 (1938).

[10]McQuillin, Municipal Corporations, § 2795 (2d ed. 1936).

[11]State of New York v. United States, 326 U.S. 572 (1946). This case demonstrates the confusion which can result on the state level. Spaur v. City of Pawhuska, 172 Okla. 285, 43 P. 2d 408 (1935). The courts classified maintenance and repair of streets as a proprietary function but found that cleaning streets and sewers was a governmental function. Le Petre v. Chicago Park District, 374 Ill. 184, 29 N.E. 2d 81 (1940). Illinois considers playgrounds, etc., a governmental function. Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E. 2d 441 (1952), considers playgrounds, etc., a proprietory function.

to avoid meeting the problem squarely,[12] but which merely add to the confusion already in existence. One court, at least, attempted to cure the confusion by completely refusing to extend tort immunity to municipalities,[13] but soon felt impelled by the weight of authority to revert to its old rule.[14] In only one jurisdiction may it be said that this confusion does not exist. South Carolina has refused to recognize any municipal liability in the absence of a statute.[15] New York, by statute,[16] seemed for a while to have removed all municipal tort immunity[17] but in seeking a safeguard against municipal bankruptcy has reinstated the original rule in a different form.[18] With the increased danger to life and property as a result of the widespread use of automobiles, many state legislatures have taken steps to waive municipal immunity in this field.[19]

From reading the strong language used by Justice Thornal in the instant case it would seem that the question of municipal tort liability is thoroughly settled in Florida. But in reality it settles the question only as far as torts committed by policemen are concerned. The many other fields of activity in which municipal corporations participate are still in the same state of confusion they were before. It would seem that the only way in which the question can finally be settled is by legislative action.[20] The most generally accepted theory is that statutes should be enacted which impose tort liability upon municipal corporations, but which limit the amount of damages which may be recovered.[21] Should the Mississippi Supreme Court be presented with a case similar to the instant one, (i.e. one involving a municipal function which is traditionally held to be governmental in its nature) it seems likely that it would hold to its settled principle of sovereign immunity.[22] On the other hand, should it be presented with a case where there are conflicting opinions as to the nature of the function, it probably would not hold thusly because its policy seems to be to limit the field of immunity wherever possible.[23]

David B. King

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[12]City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150 (1924), held the city liable because it was under a city manager form of government, therefore, "is merely a large quasi-public corporation whose activities partake more of the nature of a business than a government." Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147 (1924). The court succeeded in holding the city liable for injury inflicted by negligent handling of fire fighting equipment by labeling such handling a nuisance. Smith, "Municipal Tort Liability," 48 Mich. L. Rev. 41, 44 (1949).

[13]Fowler v. City of Cleveland, 100 Ohio 158, 126 N.E. 72 (1919).

[14]Aldrich v. City of Youngstown, 106 Ohio 342, 140 N.E. 164 (1922).

[15]Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

[16]Court of Claims Act, N.Y. Laws (1939) c. 860, § 8.

[17]Bernardine v. City of New York, 294 N.Y. 361, 62 N.E. 2d 604 (1945).

[18]Steitz v. Beacon, 295 N.Y. 51, 64 N.E. 2d 704 (1945).

[19]See Cal. Stat. c. 122 § 1714½ (1931); Ill. Laws p. 618, § 1 (1931); N.Y. Laws c. 687, § 50b (1940); Wisc. Laws c. 77 (1929). See also 89 A.L.R. 394 (1934).

[20]Smith, "Municipal Tort Liability," 48 Mich. L. Rev. 41 (1949).

[21]Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort," 9 Law & Contemp. Prob. 282 (1943).

[22]Bates v. City of McComb, 181 Miss. 336, 179 So. 737 (1938).

[23]City of Laurel v. Hutto, 220 Miss. 253, 70 So. 2d 605 (1954).

RECENT BOOKS

DIVORCE AND SEPARATION IN MISSISSIPPI. A revised edition of Amis, DIVORCE AND SEPARATION IN MISSISSIPPI. By J. W. Bunkley, Jr., with forms and pleadings by W. E. Morse. Atlanta: Harrison & Co., 1957. Pp. 505. $20.00.

Thirty-four years ago the late Judge A. B. Amis of the Meridian Bar recognized an urgent need in the legal literature of Mississippi, and filled it with a book that has become a collectors' item in the intervening years. The many Mississippi domestic relation cases quoting entire sections of Amis attest to its value to the bench and the bar. Replacing such a classic is an ambitious undertaking. The new edition succeeds in that undertaking.

In his book Professor Bunkley has preserved the work of his predecessor where the court has cited it with approval and has revised such sections as the cases dictate. Where Amis was in form a legal brief. the new edition takes textual form. The painstaking research involved in such a work is reflected in the exhaustive annotations containing the more than seven hundred Mississippi decisions on family law, through 95 So. 2d 576. Where Mississippi authority is non-existent, leading cases from other jurisdictions are cited and supplemented with textual authority and references to legal publications. Among the many new topics covered by the book are the new adoption act, the uniform reciprocal support act, separation agreements, tax consequences of divorce decrees, conflict of laws, the rights of married women, and residence requirements for divorce in the forty-eight states.

A most significant and useful addition to Amis is the chapter on forms, contributed by Mississippi's leading authority on that subject, the Hon. W. E. Morse of the Jackson Bar. Mr. Morse's forms meet his usual high standards of clarity and conciseness and will certainly prove a valuable time saver in the busy law offices of today.

For some reason, possibly because its compilation is such dull work, the weakest point in such texts is often the index. Fortunately that lament does not apply here. In addition to a thorough index, direct and reverse tables of cases are provided.

Certainly Mr. Morse requires no introduction to the Mississippi Bar. Those not familiar with Professor Bunkley's qualifications for such an undertaking as this, will be interested to know that he is a graduate with honors from the University of Mississippi School of Law, a former Sterling Fellow at Yale, where he concentrated on the study of Mississippi procedure, and since 1946 a professor of law at the University of Mississippi, where he has concentrated his study on domestic relations.

Bunkley and Morse's Amis is highly recommended for those in search of an easy to use and accurate research tool in this field. It is already apparent that this book will follow in the footsteps of its noted predecessor. There can be no better authority for that statement than the recent opinion of the Mississippi Supreme Court by Justice Ethridge in *Ladner v. Ladner,* 99 So.2d 599 (Miss. 1958).

Phil Stone
Attorney at Law
Oxford, Mississippi

MUNICIPAL LAW. By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Officers, 1957. Pp. 1125. $22.50.

The author, Charles S. Rhyne, is nationally recognized as an expert in the field of municipal law and this exhaustive book clearly demonstrates his ability and experience in this specialized field.

Included in this single volume exposition is a comprehensive analysis of such modern municipal problems as zoning, tort liability, police power, taxation, airports, eminent domain, ordinances, contracts and bonds. The author's discussions are firmly anchored to decided cases and the practitioner will find the majority as well as the minority rule on almost any municipal question that may arise.

Throughout the book it is manifest that not only the complex and controversial legal problems of municipalities are ably discussed but the reader will also find a wealth of practical information that can be utilized in the everyday practice of law. Attorneys are always being confronted by the lay public and others as to the legality of parking meters, the meaning of "spot zoning", the acquisition of off-street parking facilities, sewers, playgrounds and airports, not to mention many other municipal questions. This book provides not only a ready reference to fundamental problems but also imparts understanding and knowledge of the many legal intricacies involved in discussing any subject of municipal law.

The reviewer is of the opinion that this book is a tribute to a distinguished scholar and that Mr. Rhyne in writing this treatise must have borne in mind the admonition, "Whatsoever thy hand findeth to do, do it with thy might; things done by halves are never done right." This book is indeed worthy of being in the library of every attorney.

Carl W. Welborn
Attorney at Law
Hattiesburg, Mississippi

READY FOR THE PLAINTIFF. By Melvin M. Belli. New York: Henry Holt and Co., 1956. Pp. 338. $6.50

As the title implies, *Ready For The Plaintiff* is a panoramic view of a personal injury lawsuit, from the initial interview with the client to final judgment. Written for lay and professional readers, it is equally enlightening to both.

There is an old saying that, "Those who can, do. Those who cannot, teach or write success stories." The author does all three. He has devoted his entire professional life to doing what he undertakes to explain here. He has achieved reasonably adequate awards in all sections of the United States and in many instances in areas where such had previously been unknown. He has given abundantly of his time, boundless energy and money to the advancement of the plaintiffs' bar throughout the country, having lectured in every state in the Union and at most of the leading law schools. The methods outlined in this, his most recent publication, are both time and success tested. The gradual upward trend of judgments in personal injury cases may be traced directly to his initial one-year crusade while president of the

National Association of Claimants' Compensation Attorneys.

Characteristic of Mr. Belli, the book is entertainingly and well written. The professionals will learn from it and the laymen will benefit by its perusal and this, especially, if the latter follow the admonition to consult competent counsel, before being consulted by a fatherly insurance adjuster. One of the leading and most popular investment counsellors in the nation has recently written that when he was desperately ill, he sought out and fortunately found, one of the most skillful surgeons in the East, who, by a delicate operation, restored him to his health. He reasons that one with money to invest should just as painstakingly seek out a competent securities analyst and advisor as he sought out a surgeon.

Mr. Belli suggests in this book that every layman who delivers his wife's babies, removes his own appendix, builds his automobile from the ground up, and manufactures his own television set, should, when injured, negotiate and settle directly with the adjuster. Those less gifted, should consult and retain competent counsel, and by competent counsel is meant those who are especially skilled in the trial of personal injury litigation. Just as no reasonably intelligent person would expect a good result from a delicate brain operation, done by a proctologist, so would no thoughtful person expect an adequate award in a case intrusted to a conveyancer.

Adequate award does not necessarily mean a six-figure award. Just as $5,000 might be too much for a bruised finger, so is $100,000 too little for the life of an ordinary thirty-year old workman with a life expectancy of 40.5 years, earning $6,000 a year and leaving surviving him a wife and two small children. Those who profess themselves to be shocked at a three-quarters of a million-dollar award for the horrible mutilation of a twelve or fourteen-year old boy, later settled for $600,000, are left perfectly calm at the sale of a building for $1,000,000 which, a few years ago sold for $50,000, or at the advance of the shares of Polaroid from $4.50 in 1955 to $53.25 in 1957. Mr. Belli thinks that the price of human flesh and blood and suffering should sell for as much in the courthouse as commodities bring in the market place. He successfully explodes the myth that if insurers are actually required to pay actual value for damages done to persons, liability insurance rates will become prohibitive.

Despite the advertising campaign recently conducted by a number of the larger insurance groups and the still more subtle planting of articles in a popular magazine of wide circulation, insurance rates have not increased appreciably. I still pay $44.00 a year for policy limits of one to three hundred thousand dollars, for which I get the satisfaction of knowing that if I negligently injure someone there is at least a possibility of them being paid without expense to me.

One reviewer has very accurately said, "Despite the partisan approach, this book should be read by everyone who drives a car, by everyone who expects to get hit by a car and by every driver who is certain he will never hit anyone. It is absolutely invaluable to lawyers."

Partisan or not, the book is well worth reading and owning.

Quitman Ross
Attorney at Law
Laurel, Mississippi

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